June 14

CASES DETERMINED

BY THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS

OF THE

STATE OF MISSOURI,

JANUARY 19, 1904, TO FEBRUARY 1, 1904.

REPORTED FOR
ST. LOUIS COURT OF APPEALS
BY JOHN TURNER WHITE, of the Springfield Bar,
AND FOR THE
KANSAS CITY COURT OF APPEALS
BY BEN ELI GUTHRIE, of the Macon City Bar,
OFFICIAL REPORTERS.

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JUDGES OF THE
ST. LOUIS COURT OF APPEALS.

HON. CHARLES C. BLAND, *Presiding Judge.*

HON. VALLE REYBURN, } *Judges.*
HON. RICHARD L. GOODE, }

JOHN H. MURPHY, *Clerk.*
JOHN TURNER WHITE, *Reporter.*

JUDGES OF THE
KANSAS CITY COURT OF APPEALS.

HON. JACKSON L. SMITH, *Presiding Judge.*

HON. JAMES ELLISON, } *Judges.*
HON. ELBRIDGE J. BROADDUS, }

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CASES DETERMINED

BY THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1903.

(Continued from Volume 103.)

LAVIN, Respondent, v. GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF MISSOURI, Appellant.

St. Louis Court of Appeals, January 19, 1904.

1. **LIFE INSURANCE: Mutual Beneficiary Associations: Forfeiture of Benefit: Self-Executing By-Laws: Notice.** Where the bylaws of a mutual beneficiary association provide that a failure by a member to pay his assessment on or before a certain day shall work, *ipso facto*, a suspension and forfeiture of all right under any beneficiary certificate issued to such member, without any action on the part of the lodge, such provision constitutes a valid agreement between the lodge and the holder of the certificate; and he is not entitled to notice or a hearing before suspension for such failure.

2. ———: ———: ———: **Waiver.** The officer of a subordinate lodge in a beneficiary association, who is not an agent of the grand 'lodge, has no power to waive a by-law of the order.

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3. ———: ———: ———: ———. Where the laws of a beneficiary association require monthly assessments to be paid on or before a certain day of each month, which assessments are required to be collected by the subordinate lodges and remitted to the grand lodge on or before the first day of the succeeding month, and where the officer of a subordinate lodge, whose duty it was to collect such assessments, was accustomed to receive them after the day provided for the payment, but it was not shown that any officer of the grand lodge had any knowledge of the practice of receiving assessments after they were due, such practice does not constitute a waiver of the requirement as to the time of payment so as to prevent a suspension, authorized for non-payment.

4. ———: ———: ———: Evidence. In an action by the beneficiary in a death certificate in a mutual beneficiary order, where the defense is abandonment of the order by the insured, a letter purporting to be written by the beneficiary, the widow of the insured deceased, appealing to the order for aid and admitting that he had failed to pay his dues, is admissible in evidence, although she denies having written or sent such letter and it was not addressed to anybody, where the financier of the local lodge testified that she asked him to intercede with the lodge in her behalf, and he told her to write to the lodge and that afterwards the letter was handed to him by her or one of her daughters, it being a question for the jury to determine whether she wrote it making such admissions or not.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel G. Taylor*, Judge.

REVERSED AND REMANDED.

F. H. Bacon for appellant.

(1) Non-payment of an assessment works *ipso facto* a suspension. The laws of the order provide that non-payment of an assessment on or before the twenty-eighth day of the month shall work *ipso facto* a suspension and forfeiture, and that no action on the part of the lodge or any officer thereof shall be required as essential to such suspension. This provision was also valid and binding upon the member. Borgraefe v. Knights of Honor, 22 Mo. App. 127; Harvey v. Grand

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Lodge, 50 Mo. App. 472; Curtin v. Grand Lodge, 65 Mo. App. 294; Scheele v. State Home Lodge, 63 Mo. App. 277. (2) The same rule applies if certain conduct of the member works a forfeiture. Smith v. Knights of Father Mathew, 36 Mo. App. 184. The doctrine is also supported by cases in the Supreme Court as well as in the Federal Court. Ellerbe v. Faust, 119 Mo. 653; Reichenbach v. Ellerbe, 115 Mo. 588; Modern Woodmen v. Tevis, 117 Fed. 367; Rood v. R. R. Passenger, etc., Ass'n, 31 Fed. 162. (3) Subordinate lodge officers have no power to waive. It was not within the power of Standard Lodge, nor its financier, nor any other officer of the lodge, to waive or dispense with any of the requirements of the laws of appellant order. If the financier could, by a custom unknown to the grand lodge, change its by-laws, he could make a new contract with the member without the knowledge of his principal. This court has always recognized this principle. Chadwick v. Order of Triple Alliance, 56 Mo. App. 463. And the rule is supported by a long list of decisions, notably, Supreme Lodge v. Keener, 25 S. W. 1085; McDonald v. Chosen Friends, 78 Cal. 49; 20 Pac. 41; Eaton v. Supreme Lodge, 22 C. L. J. 560; Fed. Cas. 275; re-reported, 28 N. E. 1123, and there approved by the Supreme Court of Illinois; McCoy v. Roman Catholic, 152 Mass. 272; 25 N. E. R. 289; Sweet v. Society, etc., 78 Me. 641, 7 Atl. 394; Kocher v. Supreme Council, etc., 48 Atl. 544; Ins. Co. v. Van Winkle, 12 N. J. Eq. 333-342; Hale v. Ins. Co., 6 Gray 169; Brewer v. Ins. Co., 14 Gray 203; Miller v. Association, 42 N. J. Eq. 459, 7 Atl. 895; Id., 44 N. J. Eq. 224; 10 Atl. 106; 14 Atl. 278; Mulrey v. Ins. Co., 4 Allen 116; Evans v. Ins. Co., 9 Allen 329; Lyon v. Supreme Assembly, 153 Mass. 83, 26 N. E. 236. (4) Certain evidence offered by appellant was wrongfully excluded. The court erred in exclusion of the letter purporting to be from plaintiff, which, it was shown, was either given to the financier of the lodge by plaintiff or her daughter in response

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to a request for such letter. This was an admission by plaintiff which was binding upon her, and, if the authenticity of the letter was questioned, it was an issue to be passed on by the court. (5) The acts of the financier amounted only, if anything, to a neglect to enforce a condition of reinstatement, which he had no power to do. If the financier had the custom to accept payment of assessments after the twenty-eighth day of the month in which they were payable and before the report was sent off, on or about the twelfth day of the following month, such act, if anything, amounted only to a failure to enforce the provision of the by-laws requiring the reinstatement of a suspended member by a vote of the lodge, because, under the contract, the member had a right to reinstate himself by simply paying up within thirty days after the suspension, provided the lodge by a vote consented, which the testimony shows the lodge always did. Moreover, such act of the financier was unauthorized and beyond the power conferred by the by-laws, and the grand lodge was not shown to have any knowledge of the custom or to have consented thereto. Carlson v. Supreme Council, etc., 115 Cal. 466, 47 Pac. 375; Grand Lodge v. King, 10 Ind. App. 639, 38 N. E. 352; Graves v. M. W. of A. (Minn.), 89 N. W. 6; Rice v. Grand Lodge, etc., 92 Iowa 417, 60 N. W. 726; Woodmen of the World v. Rothschild (Tex.), S. W. 553; Wells v. Independent Order, etc., 25 Canadian L. Journal (N. S.) 209; Lyon v. Sup. Assembly, etc., 153 Mass. 83; Grand Lodge v. Jesse, 50 Ill. App. 101; Knights of Honor v. Oerters, 95 Va. 610. (6) Lavin acquiesced in his suspension and abandoned the order. Under the laws of appellant order, Lavin was bound to pay an assessment every month. Even admitting, which would be unwarranted by the evidence, that he had tendered the September assessment and the same was refused, that did not excuse him from tendering subsequent assessments or from making some inquiry into the matter, which he did not do. The evidence shows

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that the amount of $2 was tendered after the twelfth of October, which was insufficient; and that the financier explained the state of the account, and notified Lavin of his suspension, and what must be done in order to get back into the order, after which Lavin made no further payments nor effort to become reinstated but acquiesced in the suspension and abandoned the order. We contend that the following cases support the doctrine contended for: Borgraefe v. Knights and Ladies of Honor, 26 Mo. App. 226; State ex rel. Stone v. Grand Lodge, 78 Mo. App. 546; Stewart v. Supreme Council, 36 Mo. App. 319; Glardon v. Knights of Pythias, 50 Mo. App. 45; Supreme Lodge v. Wilson, 66 Fed. 785; Ryan v. Life Ass'n, 96 Fed. 786; Mutual Life Ins Co. v. Allen, 178 U. S. 351; Grand Lodge A. O. U. W. v. Scott (Neb.), 95 N. W. 191.

James J. O'Donohoe for respondent.

(1) Defendant's law, 107, which provides that the failure to pay an assessment on or before the twenty-eighth day of the month in which it falls due, works a forfeiture *ipso facto*, is unconstitutional. It contravenes the constitution of Missouri, which provides: "That no person shall be deprived of life, liberty or property without due process of law." Art. 2, sec. 30, Constitution of Missouri, p. 67 (Bill of Rights). Such a by-law is unreasonable, and where a by-law is unreasonable it is void. State ex rel. v. Merchants Exchange, 2 Mo. App. 96. (2) Even if the appellant's law with respect to forfeitures where the member fails to pay his assessment on or before the twenty-eighth day of each month were valid, yet it would not be available as a defense here, because it has been waived by appellant's course of dealing. Courtney v. Police Relief Ass'n, 73 S. W. 878; Sheehorn v. Catholic K. of A., 95 Mo. App. 233; Puhr v. Grand Lodge, 77 Mo. App. 47; Lewis v. Association, 77 Mo. App. 586; McMahon v. Knights of the

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Maccabees, 151 Mo. 522; Hanley v. Association, 69 Mo. 380; James v. Mutual Reserve, etc., Ass'n, 148 Mo. 1; Frame v. Woodmen of the World, 67 Mo. App. 127; Thompson v. Ins. Co., 52 Mo. 469; Hawthorne v. Ins. Co., 5 Mo. App. 73. (3) "Forfeitures are not favored and the courts are always ready to seize hold of any circumstance that can reasonably avoid so harsh a measure as forfeiture." Bacon on Benefit Societies, pp. 767, 772, secs. 362, 377, 379, 389. And the same rule with respect to forfeitures and suspension apply to benefit societies as it does to general insurance. Seibert v. Supreme Council, 23 Mo. App. 268. (4) By-laws working a forfeiture of membership in an association are not favored, and should be construed so as to avoid the forfeiture, if the language employed, considered in connection with other by-laws, will admit of such a construction. Connelly v. Benefit Society, 43 Mo. App. 283. (5) "Where the laws (or custom) of an association require notice to be given of assessments, the right of a member can not be forfeited by the non-payment of an assessment of which he had not notice." Agnew v. A. O. U. W., 17 Mo. App. 254; Seibert v. Chosen Friends, 23 Mo. App. 268; Mulroy v. Knights of Honor, 28 Mo. App. 463. (6) The law does not favor forfeitures and slight evidence is enough to show a waiver. Bacon on Benefit Societies, sec. 389, p. 767. The evidence here manifestly establishes a waiver. 2 Bacon on Benefit Societies and Life Ins. (2 Ed.), sec. 361, p. 712. (7) The deceased, having been sick, could not be suspended. Hoeffner v. Grand Lodge, 41 Mo. App. 359. It was "compulsory" on the appellant to pay the assessments of the deceased during his illness. Respondent's Law 106. And where the assessment has been tendered, as in the present case, there can be no forfeiture. 2 Bacon on Benefit Certificates and Life Ins. (2 Ed.), 723 to 725 (and cases cited).

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STATEMENT.

The defendant is a fraternal beneficiary association having grand and subordinate lodges. Prior to July 24 1901, Patrick Lavin had taken the workman degree of the order and was a member of Standard Lodge No. 80, and had received from the grand lodge, a beneficiary certificate, No. 53366, insuring his life in the sum of $2,000, payable at his death to his wife, Annie Lavin, the plaintiff. On July 24, 1901, Patrick Lavin died. The defendant refused to pay the insurance and this suit was brought to enforce its payment.

There are two defenses set up by the answer. First, that Patrick Lavin failed and neglected to pay the monthly assessment of $2.62 for the month of September, 1900, as required by the laws of the order, on or before the twenty-eighth day of said month, by reason of which failure the certificate sued on *ipso facto,* under the laws of the order, became null and void. Second, on November 1, 1900, Patrick Lavin abandoned his membership and severed his connection with the lodge. It was shown by the laws of the order that each member is required to pay a monthly assessment for the purpose of providing a fund to meet death losses, and that special monthly assessments for the same purpose may be made from time to time by the grand officer of the order, when the death losses are more than normal. These assessments are classified according to the ages of the members and increase with their ages. The monthly assessments of the members of the age of Patrick Lavin for September, 1900, was $2.62. In addition to this assessment, each member of a subordinate lodge is required to pay in advance one dollar per quarter as quarterly dues. The income from quarterly dues is used for the purpose of defraying the expenses of the grand and subordinate lodges and to pay the salaries of the officers.

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Law 196 of the order is as follows:

"*Levy and Payment of Assessments.*—Every member of the order who has received the workman degree shall, beginning with the month following his initiation, on or before the twenty-eighth day of each month, pay to the financier of the lodge of which he is a member, or if a member of a defunct lodge, or a lodge remaining suspended for more than ten days, to the grand recorder, one assessment according to the foregoing rates."

Law 197 is as follows:

"*Suspension for Non-Payment of Assessments.*—A failure or neglect of any member to pay any assessment on or before the twenty-eighth day of the month in which the same is payable to the financier of his subordinate lodge, or to the grand recorder, as provided by law, shall work *ipso facto* a suspension and forfeiture of all rights under any beneficiary certificate issued to him to whomsoever the same may be payable, and no action on the part of the lodge or any officer thereof shall be required as essential to such suspension and forfeiture.

"Any person suspended or expelled from the order for any cause whatever, forfeits all claim to the beneficiary fund during suspension or expulsion."

The order has an official organ, called "The Overseer," issued monthly and mailed free to every member. It was admitted that Patrick Lavin received the September, 1900, number of the Overseer. This number contained the following:

"St. Louis, Mo., Sept. 1, 1900.

"To officers and members of subordinate lodges A. O. U. W., in Missouri.

"Brethren: You are reminded that under the laws of the order one assessment under the classified plan, according to age is payable on or before the twenty-eighth day of September, 1900, by all members who have received the workman degree before the first day of September, 1900.

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"This assessment will be known officially as assessment No. 9 of 1900.

"For the information of members I certify that the following deaths of members of the order in good standing in their respective lodges have been officially reported to me since my last monthly report:

(Here follows list of deaths, which is omitted as immaterial.)

"*No Notice of Assessment Required—Members not Paying Stand Suspended.*—The laws of the order do not provide for any notice of assessments either to lodges or members, but that every member of the order who has received the workman degree shall, beginning with the month following his initiation, on or before the twenty-eighth day of each month, pay to the financier of the lodge of which he is a member, or, if a member of a defunct lodge, or a lodge suspended for more than ten days, to the grand recorder, one assessment according to the classified rates according to age. If such assessment is not paid on or before the twenty-eighth day of the month the member stands suspended, and can only be reinstated on compliance with the laws relating to reinstatement.

"LODGES MUST PAY PROMPTLY.

"Subordinate lodges, on the first day of each month, are required by law to forward to the grand recorder, the amount then in its benficiary fund, which should be equal to one classified assessment, according to age, for all the members of the lodge in good standing on the twenty-ninth day of the previous month, and such sums as have been received since the last report for reinstatements. Such assessment, payable by the lodge, is due on the first day of each month, is delinquent after the eighth of the month, and if not paid on or before the fifteenth of the month when due, the lodge stands suspended and can only be reinstated upon paying all arrearages of assessments and their indebtedness

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to the grand lodge, together with a fine of five cents per member for each assessment unpaid, and with the consent of the grand master workman.

"No officer of the grand lodge nor of any subordinate lodge has any power to waive or dispense with any of the provisions or requirements of the laws of the order, and all lodges and members must understand that the laws of the order must and will be strictly enforced.

"Yours in C., H. & P.,
"HENRY W. MEYER,
"Grand Recorder."

Other laws of the order provide for a reinstatement of a beneficiary certificate after three months, and after six months, but they are of no importance in this case as no application was made by Lavin at any time for reinstatement.

John Walsh was the financier of Standard Lodge No. 80. He testified that the assessments collected in any one month, he transmitted to the grand recorder early in the next succeeding month, usually about the eleventh or twelfth; that with the remittance, he transmitted a report of the membership of his lodge and the names of those who were suspended for failure to pay the assessments of the previous month, and that he, as financier, was required to pay to the grand recorder, the full amount of the assessments of all members of his lodge not reported as suspended for non-payment of assessments. He testified that his report to the grand lodge for September, 1900, was made out on the twelfth of October, 1900; that Patrick Lavin failed to pay the September, 1900, assessment and when he made his report, he reported Lavin as suspended for non-payment of the September assessment. This report was introduced in evidence and showed under the head of "Decrease of membership since last report, Patrick Lavin, whose certificate is No. 53366, forty-seven years

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old, rate of assessment $2.62, date of suspension, 9—29, 1900.'' He further testified that it was his habit to receive monthly assessments from any member of his lodge, if paid at any time before he made up his monthly report and when so paid, he did not report him as suspended, although the payment was made after the twenty-eighth day of the previous month, and that Patrick Lavin had frequently paid his monthly assessments, prior to September, 1900, later than the twenty-eighth of the month, the day on which it was payable, and had been reported as having paid on the twenty-eighth of the month. He further testified that Patrick Lavin, nor anyone for him, on the twenty-eighth of September, 1900, or on any day prior to the making and forwarding of the report for that month, had paid or offered to pay the September, 1900, assessment, and that it had at no time been paid or tendered. He also testified that for the accommodation of the members of his lodge, he had authorized his daughter to receive payment of their assessments at his home.

He further testified that in the spring of 1902, the plaintiff came to him about the certificate of insurance; that he advised her to write a letter to the lodge and give it to him and he would present the letter to the lodge; that a few days afterwards, she or one of her children handed him a letter which he gave to the recorder of the lodge. Plaintiff swore she could not write and that she did not authorize anyone to write to the lodge for her, and that she neither gave or sent a letter to Walsh. The letter was offered in evidence by the defendant, but was excluded by the court. It reads as follows:

"St. Louis, Mo., April 17, 1902.

"Dear Sir (not addressed to anybody): I am writing you this letter to ask assistance for myself and five helpless children. My husband, Patrick Lavin, died nine months ago. He was a member of your lodge. I

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was unable, utterly unable, to keep up payments of his lodge, so he fell back during the strike, was never able to catch up. He was in poor health, but always tried to keep on his feet, and to work, as we had no other support than his wages, which were $1.25 per day. Now since he is dead I am left to pay rent, get food and clothing and support myself and five children. I have got heart trouble, and of a very delicate constitution, and not really able to work to support such a heavy charge. I would be very grateful and appreciate any assistance given me from the brotherhood.

"Yours very respectfully,
"MRS. PAT. LAVIN."

The minutes of the lodge show that the letter was read in open lodge and referred to a special committee.

Walsh testified that sometime in October, 1900, after his report had been made up, as he remembered, Patrick Lavin's little girl came to his house one evening and offered to pay him two dollars on her father's assessment for September, 1900; that he told her it was not enough and refused to receive the money; that on a previous occasion, Lavin had paid but two dollars on his assessment and he (witness) made up the balance, sixty-two cents; that he never got this back and he could not afford to keep up this practice of paying for Lavin. That Lavin's little boy, a few days after the girl had been at his house, came to the house and offered to pay him some money on the September assessment, but that he did not have enough money to pay it, and he refused to take the money and told the boy that it was not enough. The little girl testified that she offered Walsh three dollars on the third day of September, 1900, but he would not take it, saying it was not enough, and the boy swore that a few days after his sister had been to Walsh's, he went there and offered to pay him five dollars, but he would not take it, saying it was not enough to pay Lavin's assessments and dues. Walsh flatly

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denied that either the boy or girl offered to pay him any money whatever in the month of September, 1900, and that the offers they did make, were in October and after his report of the September assessments had been made up, and that neither the boy or the girl offered enough money to pay Lavin's September assessment. Walsh testified that he told Lavin's children, in October, to tell Lavin he had been suspended, but he did not see Lavin personally to notify him.

The minutes of the meeting of the lodge on October 28, 1900, show that Patrick Lavin was reported suspended.

The plaintiff put in evidence the laws of the order, in respect to sick benefits, to the effect that the assessments of sick members, in certain circumstances, should be paid by his lodge, also evidence that Patrick Lavin was sick in the fall of 1900, but offered no evidence that Patrick Lavin notified his lodge of his sickness or made claim for any sick benefits, nor that any member of the lodge had been informed or knew that he was sick.

The issues were submitted to the court sitting as a jury, who found for the plaintiff and rendered judgment for the full amount of the certificate of insurance with interest.

The court handed down the following memorandum of its finding and opinion, which is incorporated in the abstract and which we here copy for the purpose of showing the views entertained by the court and the reasons given for its conclusion:

"The production of the benefit certificate issued by defendant to Patrick Lavin, which has never been surrendered, together with the proof of Lavin's death, and the refusal of defendant to make payment of the amount called for by the certificate, made plaintiff's prima facie case and threw the burden of proof on the defendant.

"Plaintiff pleaded two defenses: The first one, the suspension of Lavin as a member of defendant's order for failure to pay the monthly assessment of $2.62 for

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the month of September, 1900, which he was required to pay by the by-laws of the order on or before the twenty-eighth day of September, 1900. The second defense pleaded was that: On the last day of November, 1900, said Lavin abandoned his membership in said order and severed his connection therewith whereby his benefit certificate issued to him became void.

"For the first defense plaintiff relies upon the provisions of law 197 of defendant order to the effect that failure of a member to pay any assessment on or before the twenty-eighth day of the month in which the same is payable, shall work *ipso facto* a suspension and forfeiture of all right under any beneficiary certificate issued to him. To this defense of defendant plaintiff has by reply pleaded waiver. It was clearly shown by the evidence that it was the universal custom of the lodge to which defendant belonged to grant the members, whenever desired by them, an extension of about twelve or fifteen days and that the benefit of this custom had been repeatedly extended to Lavin, deceased. It is our view that the adoption of this custom constituted waiver of the provision of law 197 and the method of suspension pursued by defendant, to-wit: That of waiting until the financier made his report to the grand lodge before deeming the suspension to have taken place and then dating the suspension back to the twenty-eighth of the previous month was not justified by the by-laws, and that before effective suspension could be had in this adopted manner notice should have been given to the member. No notice was given to Lavin. It is therefore the court's view that the pretended suspension of Lavin for failure to pay the assessment due on September twenty-eighth is a nullity and constitutes no defense to plaintiff's claim.

"While the court is inclined to the view that a member of a beneficiary organization is not entitled because of a void suspension to lay back and refuse to pay further dues and at the end of a long period of delin-

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quency claim his right that such course of conduct would constitute an abandonment of membership, yet in the case at bar a reading of the entire record fails to show any evidence of Lavin's abandonment of his membership. There is not one word of evidence to show what his relations to the association were between September or October of 1900, and July, 1901, the date of his death. Defendant offered in evidence a letter containing an admission of plaintiff that Lavin had not paid his dues, but this letter was properly excluded by the court for it was not shown by defendant that it was written by or under authority of plaintiff. The question asked of plaintiff as to her knowledge, at the time of demanding payment of the grand lodge, that Lavin had not paid his dues for nine months elicited the reply that she did not know this to be a fact. No other effort was made to prove abandonment of his membership by Lavin. If such were the case, defendant could easily have proved it by its officers—this it chose not to do and leaves the case without any evidence of abandonment."

The instructions given are in harmony with the views as expressed in the opinion of the trial judge and need not be quoted.

BLAND, P. J. (after stating the facts as above).—1. Law 197 of the order, which provides that failure of a member to pay any assessment on or before the twenty-eighth day of the month in which the same is payable, shall, *ipso facto* suspend his beneficiary certificate, is attacked by the plaintiff as being harsh, unconstitutional, and not self-enforcing. She contends that under all circumstances, a non-paying member of a beneficiary association is entitled to notice and to a hearing under the laws of the land, before he can be lawfully suspended, and the cases of Seehorn v. Catholic Knights of America, 95 Mo. App. 233; State ex rel. v. Merchant's Exchange, 2 Mo. App. 96; Lewis v. Benefit Ass'n, 77 Mo. App. 586, and McMahon v. Maccabees, 151 Mo. 522, are

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cited as supporting this contention. In the Seehorn case, it appears that any branch of the order was permitted to carry a delinquent member by paying his assessments to the grand body, and that when it tired of this, the president of the branch might suspend the member. The member attempted to be suspended was in arrears for three assessments, which his branch had paid for him. The branch became tired of paying his assessments and by vote suspended him and entered its action on the minutes of its proceedings. The president then verbally proclaimed him suspended. It was held that the action of the branch was void, for the reason the power to suspend was not vested in the branch, and that the president could not suspend by a mere oral proclamation, and that the member was entitled to notice and a hearing. In State ex rel. v. Merchant's Exchange, supra, a by-law of the exchange, which compelled members to submit their business controversies to arbitration, on pain of suspension or expulsion, was held unreasonable and void. In this case it was held that membership in the Merchant's Exchange was a property right. In Lewis v. Benefit Ass'n, supra, the laws of the order provided that the benefit certificate is annulled by the suspension of a member and the by-laws of the subordinate council of the order provided that any member, thirteen weeks in arrears for dues, forfeited all rights and privileges. The deceased was in arrears for twenty-four weeks' dues, but was never formally suspended by the order. It was held that the forfeiture did not attach until the member is actually and legally suspended and that he was entitled to notice and to hearing, citing Puhr v. Grand Lodge, etc., 77 Mo. App. 47. The case of McMahon v. Maccabees, supra, does not discuss the validity of laws like the one in hand. In none of the above cases was a by-law like No. 197, of the defendant order, brought under review, and in none of them was it held beyond the power of a benevolent beneficiary association, doing an insurance business, to

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pass and enforce a law which *ipso facto* forfeits a beneficiary certificate for failure to pay any assessment made for the purpose of meeting death losses. The regular assessments levied by the defendant order to pay death losses are classified according to the age of the members. They are monthly and payable on or before the twenty-eighth day of each month. They are as regular as clockwork, are certain as to amount and time of payment, hence no special notice of their levy or of the amount or time of payment was necessary. A member holding a beneficiary certificate of the order, receives this notice once for all when he receives the certificate which, in effect, incorporates this law of the order into the contract of insurance, and a member, by accepting the certificate, agrees to pay the monthly assessments as required by Law 196, as a condition precedent to the continuance of his certificate in force. That it is competent for a beneficiary association, and a member thereof to so agree, it seems to us admits of no doubt and that such an agreement is just and fair to all the members of the order holding insurance certificates, is self-evident. A self-executing law of this kind was held valid in the following cases: Boyce v. Royal Circle, 73 S. W. 300, 99 Mo. App. 349; Borgraefe v. Knights of Honor, 22 Mo. App. 127; Harvey v. Grand Lodge A. O. U. W., 50 Mo. App. 472; Scheele v. State Home Lodge, 63 Mo. App. 277; Smith v. Knights of Father Matthew, 36 Mo. App. 184; Curtin v. Grand Lodge A. O. U. W., 65 Mo. App. l. c. 300; Zepp v. Grand Lodge A. O. U. W., 69 Mo. App. l. c. 493. In Modern Woodmen of America v. Tevis, 117 Fed. 369, it is said: "Stipulations to insure the prompt payment of the benefit assessments constitute the substance and the essence of insurance contracts of beneficial associations."

2. The learned trial court found the law (No. 197) requiring prompt payment, had been waived. It is well-settled law that the enforcement of a law to in-

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sure prompt payment, may be waived by the order issuing the certificate of insurance. The evidence upon which the court found a waiver of the law, came from Walsh, the financier of Standard Lodge, No. 80. The laws of the order requiring the subordinate lodge to collect the monthly assessments from the members and to make remittances on the first day of the succeeding month to the grand recorder; if the remittances were not made by the eighth of the month, the law pronounced the subordinate lodge in default, and if not made by the fifteenth, the lodge stood suspended. Walsh testified that his practice was to make up the report and send it in with the assessments, anywhere from the first to the twelfth or thirteenth of the following month, and that at any time prior to sending in this report and remittance, his practice was to receive assessments from any delinquent member and report him as having paid the assessment, and that prior to September, 1900, he had frequently extended this favor to Patrick Lavin and continued him on the roll of membership in good standing, but there is not a syllable of evidence that the grand recorder, or any other grand officer of the order or the grand lodge, had any knowledge or information of this practice of Walsh of receiving assessments after the twenty-eighth of the month and then reporting them as having been paid on that day, nor is there any evidence that Walsh's lodge, as a body, had any knowledge of this practice of its financier, nor is there any evidence that the financier of any subordinate lodge, other than Standard Lodge, No. 80, indulged in this negligent benevolent practice toward his brethren of the order. There is, therefore, absolutely no evidence that the grand officers of the grand lodge ever knew or assented to this negligent practice of Walsh. Walsh was not appointed by the grand lodge or by any of its grand officers to collect assessments. The laws of the order made it the duty of the subordinate lodge to collect and remit assessments. Walsh's authority to make these collections

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came from his local lodge and he was accountable to it, not to the grand lodge for his conduct. The fact that the local lodge used him as its officer to make the collections and remittances for it, did not transform him into an agent of the grand lodge, nor bind the latter by any habit he may have practiced in respect to such collections, nor impart notice to it of such habit. That the officer of a subordinate lodge, who is not even an agent of the grand lodge, has power to waive a by-law of the order, seems to us preposterous. That he can not do this, has been ruled in many cases. Borgraefe v. Knights of Honor, 22 Mo. App. l. c. 141; Chadwick v. Order of Triple Alliance, 56 Mo. App. 463; Harvey v. Grand Lodge A. O. U. W., 50 Mo. App. l. c. 477; McMahon v. Maccabees, 151 Mo. 522; Royal Society of Good Fellows, 153 Mass. 83; McCoy v. Roman Catholic Mutual Ins. Co., 152 Mass. 272; Miller v. Hillsborough Fire Assn., 42 N. J. Eq. 459; Royal Highlanders v. Scovills, 92 N. W. Rep. 206. Graves v. Modern Woodmen of America, 89 N. W. (Minn.) 6, is on all fours with the case at bar. There the clerk of the subordinate camp collected and forwarded the assessments and he, like Walsh, would collect assessments after the day they were due and report them as collected on the day they were due. It was held that this custom of the clerk was insufficient as a waiver, being unknown to the society. The same ruling was made in Boyce v. Royal Circle, supra. In similar circumstances, the Supreme Court of Virginia, in Knights of Honor v. Oeters, 95 Va. 610, held: "The forfeiture of a certificate in a benefit society is not waived by the fact that the financial reporter of a subordinate lodge is in the habit of receiving payment of assessments after the end of the month for which they are levied, and within which they are payable, under the penalty of suspension and a forfeiture of the benefit certificate, when there is no evidence that the supreme lodge, which is sued on the certificate, is aware of such habit."

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3. The letter offered in evidence and purporting to have been written by the plaintiff, and evidently intended for the lodge of which Patrick Lavin had been a member, we think, should have been admitted in evidence. True, Mrs. Lavin testified that she did not write it, nor authorize its writing, but Walsh testified she came to him and asked him to intercede with the lodge in her behalf; that he told her to write a letter to the lodge; that afterwards the letter was handed to him, either by the plaintiff or one of her daughters. It was received and read in open lodge. It was an issuable fact, under this evidence, as to whether or not the plaintiff wrote the letter or had it written for her benefit. If she did write it and put it into the hands of Walsh to be presented to the lodge, it was very important evidence to support the second defense set up in the answer, viz., that Patrick Lavin abandoned the order several months prior to his death. If this letter is genuine, it, in connection with the fact that Patrick Lavin, for two-thirds of a year prior to his death, paid no monthly assessments and at no time made any effort to have himself reinstated, within the three or six months period allowed him by the laws of the order, after he must have known he was suspended for non-payment of monthly assessments, seems to us to be very convincing evidence that he had abandoned his connection with the order. State ex rel. v. Grand Lodge A. O. U. W., 78 Mo. App. 546; Glardon v. Supreme Lodge Knights of Pythias, 50 Mo. App. 45; Supreme Lodge K. P. W. v. Wilson, 66 Fed. 785; In re Hulitt, 96 Fed. Rep. 786.

4. If the September, 1900, assessment was tendered Walsh on the third and fifth of that month, as Lavin's children testified it was, then there could be no forfeiture of the certificate of insurance for the non-payment of the assessment for that month, and the plaintiff is entitled to recover, unless the defendant is able to substantiate its second defense, which is that Lavin, after September, 1900, wholly abandoned the order. That

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these issues of fact may be properly tried, the judgment is reversed and the cause remanded. *Reyburn* and *Goode, JJ.*, concur.

DOOLEY, Appellant, v. JACKSON, Respondent.

St. Louis Court of Appeals, January 19, 1904.

1. **ELECTION: Wager: Stakeholder's Liability: Statutory Liability.** The word "election" as used in sections 3430 and 3431, Revised Statutes of 1899, means an election under the Constitution, of persons for public office; these sections do not apply to primary elections for the purpose of nominating candidates for public office, and do not authorize the recovery from the stakeholder of the wager placed in his hands on such primary election.

2. ———: ———: ———: **Common Law Liability.** A wager on the result of a primary election is illegal at common law, but one who makes such a wager and places his money in the hands of the stakeholder can not recover it, unless he notifies the stakeholder, before the result of the election has been ascertained, not to pay the money over.

Appeal from Monroe Circuit Court.—*Hon. David H. Eby*, Judge.

AFFIRMED.

W. E. Whitecotton, G. W. Whitecotton, and *E. W. Majors* for appellant.

(1) Sections 7082, 7083 and 7127 and other sections of the Revised Statutes of the State of Missouri for 1899, define, recognize and authorize the holding of primary elections such as was held in Monroe county, Missouri, on the twenty-ninth day of March 1902. Chapter thirty-two (32), of the said revised statutes, entitled "Gaming," is not only directed against losses at games

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and by gambling devices, but section 3430 of said chapter declares, "Bets and wagers on any election authorized by the Constitution and laws of this State are gambling within the meaning of this chapter." The intent is as much a part of the law as the letter of the law. State ex rel. v. Kramer, 150 Mo. 89; State ex rel. v. Rodecker, 145 Mo. 450; Schawacker v. McLaughlin, 139 Mo. 333; Heman v. McNamara, 77 Mo. App. 1. (2) The fact that this was a bet or wager as stated and that the respondent as a stakeholder had notice while the money was still in his hands as such and yet *in transitu*, and that he knew it was a bet or wager fixed his liability; and when he turned the money over to Mudd thereafter, he did so at his peril and must respond to this appellant. Vandolah v. McKee, 73 S. W. 233; White v. Gilleland, 93 Mo. App. 310; Weaver v. Harlan, 48 Mo. App. 319; Hickerson v. Benson, 8 Mo. 8. (3) As long as the money remained in Jackson's hands and he had notice from Dooley not to pay over to Mudd, the question of whether or not the event was known or had been determined was not material; and respondent became liable to the appellant when he turned the money over to Mudd, after he had received the notice, irrespective of the fact whether the event at the time of the service of the notice or prior thereto was known or had been determined.

J. H. Whitecotton, Bodine & Reynolds, W. T. Ragland for respondent.

(1) The petition does not state a cause of action within the terms of the statute. If drawn for that purpose it is insufficient. The petition alleges that the bet or wager was on a primary election, "which said primary election was duly authorized by the laws of the State of Missouri." Bets and wagers coming within the terms of the statute are on any election authorized by the Constitution and laws of this State. "In stat-

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utory actions of this sort, the party suing must bring himself strictly within the statutory requirements necessary to confer the right, and this must appear in his petition; otherwise it shows no cause of action." Barker v. Railroad, 91 Mo. 86; McNamara v. Slavens, 76 Mo. 329; Dulaney v. Railroad, 21 Mo. App. 597; Sparks v. Railroad, 31 Mo. App. 114; Ryan v. Judy, 7 Mo. App. 14; Connor v. Black, 132 Mo. 50; Sybert v. Jones, 19 Mo. 86; Cutshall v. McGowan, 73 S. W. 933. (2) In the interpretation of the gaming statute we are not at liberty to "hunt for some intention founded on the general policy of the law." The Supreme and other appellate courts of this State have consistently applied what may be termed the rule of strict construction to this and analogous statutory actions. Hickerson v. Benson, 8 Mo. 8; Crawford v. Spencer, 92 Mo. l. c. 507-508. (3) Again, the Supreme Court has laid down another rule for the interpretation of this act, viz: That it is in aid of the criminal law and must be construed in the same way. The gaming statute and the sections of the criminal code denouncing the same transactions are *in pari materia*. The rule of strict construction has been applied to similar statutes in other states. Commonwealth v. Wells, 17 W. N. C. (Pa.) 164; Commonwealth v. Howe, 144 Mass. 144. (4) Lastly appellant contends that he is entitled to recover in this case under the common law. That the event which was to determine the wager had not happened, and the result was not known at the time he notified respondent stakeholder not to pay over the wager. That the event was not determined until the Democratic central committee officially announced the result of the election, etc. The evidence is undisputed, however, that the results of the primary were unofficially known to the public at large at least two days before appellant made his "demand" of the stakeholder for a return of the wager, or gave him any notice of his intention to repudiate the bet. Humphreys v. McGee, 13 Mo. 435.

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BLAND, P. J.—The petition, omitting caption, is as follows:

"Plaintiff for cause of action against defendant states that heretofore, to-wit: on the 26th day of March, 1902, in the county of Monroe and State of Missouri, said plaintiff and one Hugh Mudd made and entered into a wager or bet on the late Democratic primary election then pending, said election being held on the 29th day of March, 1902, which said primary election was duly authorized by the laws of the State of Missouri, the same having been ordered by the duly elected, qualified and acting Democratic central committee in and for the said county of Monroe for the purpose of nominating candidates for the various offices in said county, to be voted on at the next regular election in November, in and for the State of Missouri.

"Plaintiff states that he bet or wagered five hundred dollars that one Nathan Rogers, who was then a candidate for the nomination at said primary election to the office of collector of said Monroe county, would get more votes at said primary election than one Thomas Yates who was also a candidate for the nomination to the office of collector in said county; that said Hugh Mudd bet or wagered the same amount, to-wit: five hundred dollars, that said Thomas Yates would get more votes at said primary election than said Nathan Rogers.

"That plaintiff placed the sum of money so bet or wagered by him, to-wit: the sum of five hundred dollars in lawful money of the United States, in the hands of the defendant, W. R. P. Jackson, as stakeholder, to abide the result of said primary election; that said defendant well knew that the money so placed in his hands by this plaintiff was bet or wagered by plaintiff that said Nathan Rogers would get more votes at said primary election than said Thomas Yates.

"That afterwards, to-wit: on the 31st day of March, 1902, and while such sum of money so bet or wagered was still in the hands of the defendant, W. R. P. Jackson

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and not paid over by him to the other party to such bet or wager, and before the expiration of the time agreed upon by the parties for the determination of said bet or wager, the plaintiff demanded the return of said sum of money so bet or wagered and placed in the hands of defendant herein as such stakeholder, and the defendant herein refused to return the said sum so bet or wagered or any part thereof to this plaintiff, whereby a right of action accrued to this plaintiff according to the statutes of this State in such cases made and provided.

"Wherefore plaintiff prays judgment against defendant herein, for the said sum of five hundred dollars, together with interest thereon from the said 31st day of March, 1902, together with the costs of this suit."

There is no controversy about the facts. Briefly stated they are as follows: Nathan Rogers and Timothy Yates were opposing candidates before the primary election to be held by the Democratic party of Monroe county for nomination to the office of collector for said county to be voted at the election in November, 1902. Dooley, the plaintiff, and H. B. Mudd made a bet on the result of the vote to be cast at the Democratic primary election between Rogers and Yates, and executed the following memorandum of their bet:

"Paris, Mo., March 21, 1902.

"This is to certify that we have made a bet as follows: A. G. Dooley bets H. B. Mudd five hundred dollars that Nathan Rogers will get more votes in the Democratic primary in Monroe county for collector than Thomas Yates and have placed twenty-five each as forfeit.

"H. B. Mudd,
"A. G. Dooley."

They agreed upon the defendant as stakeholder and delivered to him the above memorandum and each put into his hands a stake of five hundred dollars, with the understanding that he should pay the same to the win-

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ner of the bet. The county executive committee of the Democratic party of Monroe county had called a primary election to be held in each school district of the county on the twenty-ninth day of March, 1902, for the purpose of nominating candidates of the Democratic party for county officers of Monroe county, including the office of collector, and formulated rules and regulations for holding said primary. On the day designated by the committee the primary election was held and the poll books of the election were returned to the Democratic central committee which had adjourned on March 29th to meet on April 5, 1902. The committee met on April fifth pursuant to adjournment and canvassed the vote cast at the primary election. By the canvass it was shown that Rogers had received six hundred and forty-four votes and Yates seven hundred and twenty-two. It appears that before the canvass was made it was generally known throughout the county that Yates had received more votes than Rogers, and on the third day of April defendant handed over to H. B. Mudd the stake, to-wit, one thousand dollars, which he held as stakeholder. On the previous day (April 2d) plaintiff served on the defendant the following written notice by delivering or causing to be delivered to him copy of the same, to-wit:

"To W. R. P. Jackson,
"Monroe City, Mo.

"You are hereby notified not to pay over to Hugh Mudd or any one else, any monies, held by you as stakeholder, bet by me with Hugh Mudd, on the results of the vote at the primary election as to the candidacy of Nathan Rogers and Thos. Yates for collector of Monroe county, Missouri, said primary election having been held on March 29th, 1902. This 2nd day of April, 1902.

"A. G. DOOLEY."

Within three months after defendant handed the stake over to Mudd, the petition in this cause was filed in

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the office of the circuit clerk of Monroe county and the summons issued thereon was duly served on defendant.

The plaintiff moved the court to instruct the jury as follows:

"1. The court instructs the jury that under the law and the evidence your verdict must be for the plaintiff.

"2. The court instructs the jury that if you find from the evidence in the case that the plaintiff on or about March 21st, 1902, entered into a bet or wager in Monroe county, Missouri, on the Democratic primary election, if any, then pending, and to be held in said county and State, and which was held in said county and State on March 29, 1902, if the jury so find, the plaintiff betting one Hugh B. Mudd the sum of five hundred dollars that one Nathan Rogers would, at said election, get more votes for the nomination to the office of collector of the county of Monroe and State of Missouri, than one Thomas Yates, and Hugh B. Mudd betting plaintiff the sum of five hundred dollars that the said Nathan Rogers would not at said primary election get more votes for the nomination to the office of collector of the county of Monroe, and State of Missouri, than Thomas Yates, if the jury so find; and that said sums so bet or wagered, if any, were by said plaintiff and Hugh B. Mudd put into the hands of defendant Jackson, as stakeholder, to abide the result of the vote cast at the said primary election for the said Nathan Rogers and Thomas Yates for the nomination to the office of collector of said county and State as aforesaid, and that defendant knew that said sums were staked as a bet or wager on said primary election, and knew that fact, if any, at any time prior to his paying said sum over to said Mudd.

"And if the jury further find from the greater weight of the evidence in the cause, that the plaintiff notified the defendant not to pay over to the said Hugh

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B. Mudd the sum of money so bet by plaintiff, before the defendant Jackson paid said sum over to the said Hugh B. Mudd, then your verdict must be for the plaintiff."

The court refused these instructions and the cause was submitted to the jury without any instructions. The verdict was for the defendant. A motion for new trial proving of no avail, plaintiff brings his case here by appeal.

Section 3430, R. S. 1899, declares: "Bets and wagers on any election authorized by the Constitution and laws of this State are gaming within the meaning of this chapter" (chapter 32). The next succeeding section (3431) reads as follows:

"Every stakeholder who shall knowingly receive any money or property, staked upon any betting declared gaming by the foregoing provisions, shall be liable to the party who placed such money or property in his hands, both before and after the determination of such bet; and the delivery of the money or property to the winner shall be no defense to any action brought by the losing party for the recovery thereof; *Provided,* that no stakeholder shall be liable afterwards unless a demand has been made of such stakeholder for the money or property in his possession, previous to the expiration of the time agreed upon by the parties for the determination of the bet or wager."

As originally enacted (Session Acts of 1840-41) the statute declared it to be "gaming to bet or wager any money, etc., on the result of any election or any vote to be given at such election authorized by the Constitution or laws of the State." In the revision of 1855 and in all subsequent revisions the section reads as at present. If the primary election upon which the bet was made was an election within the meaning of section 3430, supra, and was authorized by the Constitution and laws of this State, the bet was gaming within the meaning of section 3430, supra, and plaintiff was entitled to the

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peremptory instruction asked by him directing the jury to find the verdict in his favor.

Section 7081, R. S. 1899, authorizes the nomination of candidates for office by a political party at a primary election if the party at the previous general election cast at least three per cent of the vote of the county. Section 7082 defines a primary election to be an "election held within the State, county, district or subdivision thereof by the members of any political party for the purpose of nominating candidates for office." Section 7803 provides that the certificate of nomination to office, when made by a primary election shall be signed by the presiding officer and secretary of the political committee under whose directions the primary was held. Section 7088 defines what is a central political committee and its powers to make nominations to fill vacancies. Section 7127 requires that the judges and clerks of any primary election held for the purpose of nominating candidates shall before entering upon their duties take and subscribe the oath prescribed by law for judges and clerks of election. Section 7128 prescribes the penalty for illegal voting at primary elections, and section 7130 prescribes the penalty for making fraudulent returns of a primary election by the judges, clerks or tellers thereof. The certificate of nomination provided for by section 7083 is under the statute made an official document and evidence of the nomination of the person named in the certificate and the filing of this certificate with the county clerk of the county in which the primary is held authorizes and requires him to enter the name of the person therein named as nominated upon the poll books and to have his name printed on the official ballot.

The legislation above referred to makes it plain that primary elections are authorized by the laws of the State. But to constitute the offense of gaming on the result of an election, the election must have been such a one as is mentioned in the statute, that is, it must have

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been authorized by both the Constitution and laws of the State and come within the meaning of the term "election" as used in the statute. At first blush it might seem that an act of the Legislature is authorized by the Constitution if it is a valid act. But a State Legislature, unlike the National Congress, has full legislative power wherever it is not restrained by the Constitution; whereas Congress has power only when it is granted by the Constitution. Hence, the Legislature does not need express constitutional authority to legislate on a subject, but only lack of a constitutional prohibition. "Authority" given by the Constitution to pass a law means, therefore, more than that there is no restriction against passing a law; it means a positive constitutional direction in regard to it. It follows that the Constitution of the State does not authorize the passage of an act regarding primary elections, although such an act of the Legislature is valid for it is not prohibited by the Constitution. The word "election" frequently occurs in the Constitution of the State. First, in section 9, article 2, and article 8 of that instrument is wholly devoted to the subject of elections. But wherever used in the Constitution it is used in the sense of choosing a person or persons for office by vote, and nowhere in the sense of nominating a candidate for an office by a political party. "Where a word is used in a certain or restricted sense in the Constitution and the Legislature uses the same word without restriction or qualification in an act in respect to the same subject-matter the word in the statute should receive the same interpretation that the Constitution has given it." Mayor of Valverde v. Shattuck, 41 Am. St. Rep. l. c. 215; Commonwealth v. Kirk, 4 B. Mon. l. c. 2. "All acts which relate to the same subject, notwithstanding some of them may be expired or are not referred to, must be taken to be one system and construed consistently," said Lord MANSFIELD in Rex v. Loxdale, 1 Burr. 447. "Where in the body of the laws of the State, words

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are used in a particular meaning, such words when used in a subsequent statute are to be understood in the same sense." Collins v. Wilhoit, 35 Mo. App. 585; Dawson v. Dawson, 23 Mo. App. 169. In State ex rel. v. McGowan, 138 Mo. 187, it is said: "The words of a statute must be so limited as to be in harmony with the Constitution."

"A legislative act is always to be considered with reference to the pre-existing body of law to which it is added and of which it is thenceforth to form a part. . . . Hence arises the rule that in case of doubt or ambiguity the statute is to be construed as to be consistent with itself throughout its extent and so as to harmonize with the other laws relating to the same kindred matters," says Black on Interpretation of Laws, p. 60.

A Pennsylvania Act, approved July 2, 1839, relating to elections declared that "any person who shall make a bet or wager or shall offer to make a bet or wager, or shall challenge or invite any person to make a bet or wager, upon the result of any election within the commonwealth, upon conviction thereof shall forfeit and pay three times the amount so bet or offered to be bet," etc. It has been the custom in that State for many years for members of the Democratic party in Greene county to hold primary elections to nominate candidates to be voted for at the next general election. On May 27, 1882, Ross, Brant and Patton were candidates for nomination in Greene county for the office of State senator and as such were voted for at a primary election by the qualified voters of the Democratic party. Rinehart and Cole, both qualified voters of Greene county, wagered or bet $200 on the result of the election between Brant, Patton and Ross, and placed the money so bet in the hands of William Wells. In a suit by the commonwealth against Wells to recover the penalty provided for by the Act of July 2, 1839, it was held that the words, "any election within the commonwealth,"

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as used in said act, applied only to the election of public officers and that Wells was not liable for the penalty. Commonwealth v. Wells, 110 Pa. St. 463.

Section 182, of the criminal code of Nebraska, provided that "any person who shall have voted in any precinct, or in any ward of any city in this State in which he is not actually a resident ten days or such length of time as required by law next preceding the election or into which he shall have come for temporary purposes shall be fined in a sum not exceeding $500 nor less than $50, or be imprisoned in the jail of the proper county for not more than six months."

In State of Nebraska v. Chichester, 11 L. R. A. 104, it was held that the defendant was not amenable to the penalties of section 182 for having unlawfully voted at a village election, for the reason that such elections were not specifically mentioned in the section and that the word "precinct" did not include village.

It is a universal rule in English and American jurisprudence that penal statutes are to be strictly construed and not extended by implication, intendments, analogies, or equitable considerations. Black on Interpretations of Laws, p. 286; Sutherland on Statutory Construction, sec. 208; Sedgwick on the Construction of Statutory and Constitutional Law (2 Ed.), p. 281; City of St. Louis v. Goebel, 32 Mo. 295; Rozelle v. Harmon, 103 Mo. 339; Mellor v. Railway, 105 Mo. 459; St. Charles v. Hackman, 133 Mo. 634; State v. Reid, 125 Mo. 43; State v. Schuchmann, 133 Mo. 111; Vegelsmeier v. Prendergast, 137 Mo. 286; State ex inf. v. Bland, 144 Mo. l. c. 555. If there be any doubt whether a statute embraces the offense, the doubt is to be resolved in favor of the accused. 1 Bishop on Criminal Law, secs. 134-5; United States v. Morris, 14 Pet. 464; United States v. Sheldon, 15 Wheat. 119.

The word "election" as used in the Constitution is used in a restricted and political sense and means the

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election of political officers (Mayor of Valverde v. Shattuck, supra). In Commonwealth v. Kirk, supra, an election was defined as the vote or the taking of the vote of the citizens from members to represent them in the General Assembly or other political stations.

The lexicographers define election as follows:

"The act of choosing a person to fill an office as by a ballot, unlifted hands, *viva voce;* as the election of a president or a mayor."—Webster.

"The act or process of choosing a person or persons for office by vote; a polling for office; also the occasion or set time and provision for making such choice; as a general or special election."—Century Dictionary.

"The act of electing, choosing or selecting out of a number by vote for appointment to any office or employment."—American Encyclopedia Dictionary.

Anderson's Law Dictionary says that in its constitutional sense it means "a selection by popular voice of district, county, town or city, or by some organized body in contradistinction to appointment by some single person or officer."

Bouvier's Law Dictionary defines it to be: "The choice, selection of one person from a special class to discharge certain duties in a State, corporation or city."

We think it is clear that the word "election" as used in the statute is used in its political sense and in the same sense in which it is used in the Constitution and means an election for public office and does not include a primary election for the purpose of nominating a candidate for public office, and also that a primary election is not an election authorized by the Constitution.

2. Plaintiff contends that if not entitled to recover on the statute he is entitled to recover at common law. A wager on the result of an election is illegal at common law because against public policy, but when the losing

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party to the illegal contract remains silent until the contract is executed by the determination of the result upon which the wager was made, he can not recover his part of the stake. Hickerson v. Benson & Workman, 8 Mo. 8; Humphreys v. Magee, 13 Mo. 435; Cutshall v. McGowan, 73 S. W. (Mo. App.) 933. The uncontradicted evidence is that, notwithstanding the central committee had not met and canvassed the vote on which the wager was made, yet prior to the service on defendant of the notice (set out in the statement) not to pay the stake to Mudd, the result of that election had been ascertained and was well known, and was known to the parties to this suit. This state of the evidence shows that plaintiff put off the day of repentance until the common law closed the door of hope against him.

The judgment is affirmed. *Reyburn* and *Goode, JJ.*, concur.

STATE OF MISSOURI, Respondent, v. HOTTLE, Appellant.

St. Louis Court of Appeals, January 19, 1904.

CRIMINAL LAW: Venue. In a prosecution against a druggist under section 3051, Revised Statutes of 1899, for permitting the drinking of intoxicating liquors in defendant's place of business, where the evidence failed to show that the place of business was in the county where the information was filed, or in this state, the venue was not established.

Appeal from Clark Circuit Court.—*Hon. E. R. McKee*, Judge.

REVERSED AND REMANDED.

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Whiteside & Yant for appellant.

(1) The venue was not proven, neither by direct proof nor by proof of facts and circumstances from which it could be made to appear that the offense charged was committed in Clark county, Missouri; hence the evidence does not show jurisdiction and will not support verdict of guilty. State v. McGinnis, 74 Mo. 245; State v. Hartnett, 75 Mo. 251; State v. Burgess, 75 Mo. 541; State v. Babb, 76 Mo. 501; State v. King, 111 Mo. 576; State v. Hopper, 21 Mo. App. 510; State v. Quaite, 20 Mo. App. 405. (2) The intent of the law is the prime object to be kept in view in its construction, and the general purpose and object of the statute and the mischief it was intended to remedy is not to be overlooked in its construction and the interpretation should be reasonable. Carson Rand v. Stern, 129 Mo. 381; Ross v. Railway, 111 Mo. 18; Neenan v. Smith, 50 Mo. 525; Spitler v. Young, 63 Mo. 42. The statute upon which this prosecution is based was not meant to apply to cases such as the proof shows this to be. R. S. 1899, secs. 3047 and 3051; State v. Larrimore, 19 Mo. 391, and authorities above cited under point last preceding. (3) The statute under which this prosecution is had, applies only to a special class, druggists, and the state must prove that defendant was a licensed merchant or druggist who had continuously in his employ to fill or superintend the filling of all prescriptions, a registered pharmacist. State v. Basket, 52 Mo. App. 389; State v. Wells, 28 Mo. 565; State v. Alexander, 73 Mo. App. 605; State v. Workman, 75 Mo. App. 454; State v. Quinn, 67 S. W. 974. (4) There was nothing in this case to warrant the judge in commenting upon the argument of counsel for defendant, as was done in the instruction given by the court upon his own motion. And this same instruction construes the statute in a manner which we claim is erroneous.

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W. T. Rutherford for respondent.

(1) Where the venue is not proven by direct and positive evidence, courts and juries will examine the whole evidence for facts and circumstances from which it may be fairly deducible. State v. Bailey, 73 Mo. App. 576; State v. Sanders, 106 Mo. 188; State v. Chamberlain, 89 Mo. 129; State v. Hill, 96 Mo. 357; State v. Knolle, 90 Mo. App. 238; State v. Ruth, 14 Mo. App. 226; State v. Fitzporter, 16 Mo. App. 282; State v. Nolle, 96 Mo. App. 524; State v. Snyder, 44 Mo. App. 429; R. S. 1899, sec. 3039; (2) The defendant's drugstore and place of business being in Wyaconda, and the proof showing the liquor was drunk in the drugstore, and Wyaconda being an incorporated city of the fourth class, prior to and at the time the offense is charged to have been committed, the court will take judicial knowledge of its incorporation, which will disclose the fact that Wyaconda is in Clark county, Missouri. R. S. 1899, sec. 5894; City of Brookfield v. Tooey, 141 Mo. 619; City of Trenton v. Devorss, 70 Mo. App. 8; City of Savannah v. Dickey, 33 Mo. App. 522; City of Billings v. Dunnaway, 54 Mo. App. 1; City of Clarence v. Patrick, 54 Mo. App. 462.

BLAND, P. J.—The defendant, a proprietor of a drugstore, was convicted of a violation of section 3051, R. S. 1899, for permitting the drinking of intoxicating liquors in his place of business. From this conviction he appealed.

It is contended by appellant that there was no proof of the venue. The evidence showed that Dr. J. W. Peckstein was a registered pharmacist in Clark county; that he resided in Wyaconda and had his office in the same building in which the defendant kept a drugstore and that he was the owner of the building. Witness Speer testified that he lived in Wyaconda and that he had

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drunk beer in the back room of defendant's drugstore. On this evidence it reasonably appears that defendant's drugstore was kept in Wyaconda; but it nowhere appears that Wyaconda, if a town or village, is in Clark county or in this State. Such evidence is insufficient to establish the venue. State v. King, 111 Mo. 576, and cases cited.

The judgment is reversed and the cause remanded. *Reyburn* and *Goode, JJ.*, concur.

BLACK, Respondent, v. SCOTT et al., Appellants.

St. Louis Court of Appeals, January 19, 1904.

1. **LANDLORD AND TENANT: Rent in Kind.** An agreement to rent land for "two-fifths of the corn in the crib," entitles the landlord also to recover two-fifths of the value of the fodder raised on the land and converted by the tenant to his own use, though fodder is not mentioned in the agreement.

2. **COSTS: Jurisdiction: Conversion.** Costs are properly taxed against the defendant in an action for conversion, though the right of action rose out of a contract of lease and the amount of the verdict was below the jurisdiction of the circuit court where the case originated.

Appeal from Knox Circuit Court.—*Hon. E. R. McKee*, Judge.

AFFIRMED.

O. D. Jones and *James Dorian* for appellant.

C. D. Stewart for respondent.

BLAND, P. J.—Omitting caption the petition is as follows:

"The plaintiff states that he is now and was during the year 1901 and for several years prior thereto the

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owner of the southwest one-fourth of the southeast quarter of section thirty-one (31), township sixty-two (62), range twelve (12), Knox county, Missouri, and that he rented said land to defendants for the year 1901 to be cultivated in corn and that defendants agreed and promised plaintiff to give him two-fifths of the crop raised on said land and to husk plaintiff's part of the corn and put it in plaintiff's crib and plaintiff says that defendants cut the stalks and corn raised on said land and put it in shocks and that they refused and failed to deliver or account for plaintiff's part of the shock fodder and converted the same to their own use and that plaintiff's part of said fodder was reasonably worth eighty dollars ($80).

"Wherefore plaintiff prays judgment for the sum of eighty dollars ($80) and his costs."

The answer admitted that plaintiff was the owner of the land described; admitted that the defendants rented the land for the year 1901, to be cultivated in corn; admitted that they agreed to give plaintiff as his rent for the use of the said land two-fifths of the corn raised on said land to be delivered in the plaintiff's crib; admitted that they cut the corn raised on the land and that they refused to deliver to plaintiff one-third of the shock fodder and converted the same to their own use, and alleged that in delivering two-fifths of the corn in plaintiff's crib they paid plaintiff all the rent reserved for the use of the land.

Wiseman, who was the agent of plaintiff for the purpose of renting the land, testified that the defendants applied to him to rent the land and he made two propositions to them: First, that they could have the land for one-half the corn in the field. Second, for two-fifths in the crib, and after considering the propositions they accepted the latter and agreed to deliver two-fifths of the corn in the crib; that there was nothing said about the shock fodder or stalks. The testimony of the defendants is that they rented from plaintiff through

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Wiseman, his agent, and agreed to pay two-fifths of the corn delivered in the crib as rent.

It is admitted that two-fifths of the corn was husked by defendants and delivered in the plaintiff's crib. The defendants did not reside upon the land nor did the plaintiff. The testimony shows that defendants occupied the land until the first of March, 1902, without objection from the plaintiff. On this evidence the trial court ruled that plaintiff and defendants were tenants in common of the corn and the shock fodder and that plaintiff was entitled as such tenant in common to two-fifths of the shock fodder. Under this ruling the jury found for plaintiff and assessed his damages at the sum of $47. After unavailing motions for new trial and in arrest of judgment defendants appealed.

The case is on all fours with Moser v. Lower, 48 Mo. App. 85, and on the authority of that case we hold that the plaintiff was entitled to recover. Defendants moved to tax the costs to the plaintiff for the reason, as alleged that the suit is on contract and the recovery being for $47, under the statute plaintiff was liable for the costs. The subject-matter of the suit arose out of contract, but it is not on the contract to recover two-fifths of the fodder corn in kind, but for damages for its wrongful conversion by the defendants and hence sounds in tort and defendants were properly taxed with the costs.

The judgment is affirmed. *Reyburn* and *Goode, JJ.*, concur.

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McGEE et al., Appellants, v. SMITH et al., Respondents.

St. Louis Court of Appeals, January 19, 1904.

1. **EVIDENCE: Cost Bond: Title of Cause: Variance.** In an action on a cost bond, alleged to have been filed in a suit brought in the name of a city at the relation of S., where the bond offered in evidence omitted the city's name and gave the relator as plaintiff, though it clearly appeared that it was filed and intended as security in that case as alleged, it was error to exclude it; there was no variance between the pleading and the proof.

2. ——: ——: ——: **Estoppel.** The bondsmen, having filed the bond, on the faith of which the relator was enabled to continue the prosecution of his suit and to force the incurring of additional costs in that case, are estopped to deny that the bond offered was the bond alleged.

Appeal from Monroe Circuit Court.—*Hon. David H. Eby*, Judge.

REVERSED AND REMANDED.

Thomas F. Hurd and *Frank W. McAllister* for appellants.

(1) The execution of the bond sued on and charged to have been executed by defendants not being denied by answer verified by affidavit, is adjudged confessed. R. S. 1899, sec. 746. (2) Judgment might properly have been rendered against the sureties on the cost bond at the time of the judgment against Smith, but as this was not done they have an action on the bond to recover the costs. Davis v. Farmer, 28 Mo. 54. (3) Witness Creigh should have been permitted to identify the bond sued on as the identical paper filed with him and referred to in the record entry of June 14, 1894. Collins

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v. Kammann, 55 Mo. App. 464; Kansas City v. Smart, 128 Mo. 272; Powers v. Wright, 39 Mo. App. 205.

J. H. Whitecotton for respondents.

(1) There is no question as to the execution of the bond raised in the case, but respondents deny that this bond was made in the case alleged in appellant's petition. There being a fatal variance between the obligation set out in the petition and the one offered in proof the appellants were not entitled to recover. Wright v. Fonda, 44 Mo. App. 634; Cole v. Armour, 154 Mo. 333. (2) The question of variance being a question of law for the court and the same having been submitted to the court, its finding is conclusive. Berry v. Dryden, 7 Mo. 324; Buch v. Benton, 26 Mo. 153. (3) The respondents admit that judgment might have been rendered on a proper bond in the case at the time of the entering judgment in the original case, but that does not give any authority to appellants to recover on the bond put in evidence in this cause.

STATEMENT.

The suit is to recover on the following cost bond:

"James H. Smith, plaintiff,

against

"W. R. McGee et al., defendants.

"In the circuit court of Monroe county, Missouri.

"We, the undersigned residents of Monroe county, Missouri, do hereby acknowledge ourselves bound to pay all the costs which have accrued or may accrue in the above entitled cause.

"Witness our signatures this — day of June, 1894.

"Jas. H. Smith,
"C. F. Mahan,
"Wm. H. Johnson,
"Jas. R. Jackson,
"Allen Bryan,
"D. C. Bryan.

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"June 16, 1894.—Approved this date.

"CHAS. A. CREIGH,

"Clerk."

The answer was a general denial and a plea of payment.

Plaintiffs proved by the records of the Monroe circuit court that in a case wherein the City of Paris ex rel.,, James H. Smith was plaintiff, and these plaintiffs were defendants (brought on the official bond of McGee given to the city of Paris for the faithful performance of his duties as marshal of said city) the other defendants (plaintiffs herein) being sureties on the bond, Smith was required by an order of the court to give security for costs; that in compliance with said order Smith filed bond for costs. The suit resulted in a judgment against Smith for the costs, but no judgment was entered against anyone as surety for such costs. Evidence was offered showing the amount of costs that had accrued to defendants in the action both before and after the rendition of the judgment, and that an execution had been issued against Smith for the costs which had been returned not satisfied.

Under date of June 16, 1894, the record contains the following entry:

"City of Paris ex rel. James H. Smith, plaintiff,

v.

"W. R. McGee et al., defendants.

"At this day comes the plaintiff herein by attorney and files his bond for costs in this cause."

The clerk of the court testified that he approved and filed the bond. He was asked in what suit it was filed. The question was objected to on the ground that the record shows in what suit it was filed, and that it (the record) could not be changed by parol evidence. The objection was sustained, to which ruling plaintiffs' counsel then and there objected and excepted. Plaintiffs offered the bond in evidence. The court ruled that it might be admitted as "the paper that was approved

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and filed by the clerk." The following then took place:

By counsel for the plaintiffs: "I wish to ask the witness whether or not this was the bond filed in that cause at that time? A. Yes, sir. That is the bond that was filed in the Smith case v. McGee on that day, sixteenth of June, 1894."

On cross-examination witness testified as follows:

"Q. Why did you enter on the record there a different title to the suit than this bond? Why did you enter on the record here, 'June 16, 1894, City of Paris ex rel. James H. Smith v. W. R. McGee et al., defendants?' Do you remember why you made that entry in that case when the bond shows upon its face it was Jas. H. Smith v. W. R. McGee? A. There was a bond offered in that case of Jas. H. Smith v. W. R. McGee.

"Q. Don't you know there was another suit against McGee? A. There was no suit at that time.

"Q. Either prior to that or subsequent to that? A. Yes, sir; there was subsequent to that; there was none prior to that."

The court to whom the cause had been submitted, sitting as a jury, took the case under advisement for a few days and on April 15, 1902, found the issues for the defendants. A timely motion for new trial was filed which the court overruled, whereupon plaintiffs appealed to this court.

BLAND, P. J. (after stating the facts as above).—No instructions were asked or given and as there was no dispute but that a part of the costs that had accrued in the case of the City of Paris ex rel. Smith v. McGee et al., was unpaid, the only theory upon which the finding of the learned trial judge can be supported is that, in his opinion, the bond read in evidence varied from the one described in the petition and for that reason was excluded as evidence. It is conclusively shown by the records of the Monroe circuit court that Smith, in the case of the City of Paris ex rel. Smith v. McGee et

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al., was required to file bond for the costs and that he complied with that order by filing a cost bond that was approved by the circuit clerk, and was thereafter permitted by the court to prosecute his suit to a final termination. It is also shown that at the time the cost bond read in evidence was filed there was no other suit pending in the Monroe circuit court wherein Smith was plaintiff and McGee et al. were defendants, so that it appears beyond a doubt that the bond offered in evidence was the bond which Smith filed in the case of the City of Paris ex rel. Smith v. McGee et al. The bond was prepared by these defendants or their attorney and was signed by the defendants and filed by them in the court as security for the costs in the suit brought by Smith on McGee's bond as marshal of the city of Paris. The city of Paris was but a nominal party to the suit, had no interest in it, and was not and could not be made liable for any of the costs. If there had been two suits pending in the Monroe circuit court wherein Smith was a party plaintiff and McGee a party defendant, in both of which an order had been made on plaintiffs to give security for costs, and the bond sued on had been filed after the making of such orders, there would be some question as to which of the two suits the bond was filed in. But there being but the one suit and but the one order to give security for costs, there can be no doubt that the bond was filed as security for costs in the only suit then pending wherein Smith was a plaintiff and McGee a defendant, to-wit, the case of the City of Paris ex rel. Smith v. McGee et al. Under this state of the proof the bond should have been admitted as evidence for there is no material variance between it and the one alleged in the petition to have been filed.

It also seems to us that the defendants, having executed and filed a bond as security for costs in the suit wherein the City of Paris ex rel. Smith was plaintiff and McGee et al. were defendants, on the faith of which bond Smith was enabled to continue the prosecution of his

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suit and to force the defendants to incur additional costs in the preparation for and in presenting their defense to the suit, they ought under the evidence in this case to be estopped to deny the bond offered in evidence was the bond sued on.

The judgment is reversed and the cause remanded. *Reyburn* and *Goode, JJ.*, concur.

SPAULDING, Appellant, v. CITY OF EDINA, Respondent.

St. Louis Court of Appeals, January 19, 1904.

1. **PRACTICE: New Trial: Newly Discovered Evidence.** Affidavits, filed by defendant, with a motion for a new trial on the ground of newly discovered evidence, which contain only statements made to affiants by plaintiff's husband, should not be considered because the evidence is hearsay.

2. **APPELLATE PRACTICE: Weight of Evidence: Function of Trial Court.** When a verdict has been set aside by the trial judge for the reason that in his opinion it is against the weight of evidence, it is only in a case free from doubt that an appellate court will review the action.

Appeal from Knox Circuit Court.—*Hon. E. R. McKee*, Judge.

AFFIRMED.

C. R. Fowler and *L. F. Cottey* for appellant.

(1) The rule is well settled, that a motion for a new trial, on the ground of newly discovered evidence, must be supported by the affidavit of the party moving for a new trial, or some excuse given for its absence. (2) In this case the defendant is a corporation, but the mayor is the chief officer and legally represents the defend-

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ant. Service of summons must be had on the mayor because he is the chief officer. We think the affidavit is fatally defective because not made by the mayor or at least some excuse given for its absence. The general rule is stated in the following cases: State v. McLaughlin, 27 Mo. 111; State v. Nagel, 136 Mo. 50; State v. Campbell, 115 Mo. 393; State v. Nickens, 122 Mo. 612; State v. Gordon, 153 Mo. 577; State v. Soper, 148 Mo. 240; State v. Lucas, 147 Mo. 72; State v. Miller, 144 Mo. 30. (3) Again the rule is well settled that the evidence must not be cumulative, and must be so material that it would probably produce a different result if the new trial were granted. State v. Ray, 53 Mo. 349; State v. Potter, 108 Mo. 430; State v. Myers, 115 Mo. 398; State v. Sansone, 116 Mo. 14; Folding Bed Co. v. Railroad, 148 Mo. 484 and 485. (4) We insist that the court erred in granting a new trial on the second ground stated in the order; that the verdict is against the greater weight of the evidence. We concede the general rule to be, that the appellate courts will not weigh the evidence, where there is a substantial conflict. But there is a well defined exception to that rule. The exception is, that if upon the whole record, the party in whose favor a new trial has been granted was not entitled to a verdict, then the action of the trial court in granting a new trial will be set aside, and the verdict restored to the party entitled to it. Haven v. Railroad, 155 Mo. 229; Graney v. Railroad, 157 Mo. 678; Neville v. Railroad, 158 Mo. 318; Roberts v. Telephone Co., 166 Mo. 385; State to use v. Stinebaker, 90 Mo. App. 280; Roman v. Boston Trading Co., 87 Mo. App. 191; Kingsbury v. St. Joseph, 94 Mo. App. 304; Knapp, Stout & Co. v. Standley, 45 Mo. App. 264; Smith v. Railroad, 92 Mo. App. 41.

G. R. Balthrope and *C. D. Stewart* for respondent.

(1) The court did not err in sustaining the motion on ground of newly discovered evidence. Howland v. Reives, 25 Mo. App. 458; State v. Murry, 91 Mo. 95, 103

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and 104; State v. Bailey, 94 Mo. 315 and 316; State v. Mobeary, 21 Mo. 604; Coleman v. Cole, 96 Mo. App. 22. (2) The court did not err in sustaining the motion on account of the verdict being against greater weight of the evidence because the volume and weight of the evidence is against the verdict and in favor of defendant on merits. Moore v. Railroad, 146 Mo. 582; Hurst v. Railroad, 163 Mo. 322; 1 Bailey on Personal Injuries, sec. 1123. (3) The evidence in this case is conflicting as to what caused the injury complained of, and on the whole favors the defendant and it is the duty of the court to set aside a verdict that he is not satisfied with and does not concur in. Railroad v. Martin, 43 Mo. App. 597; State v. Young, 119 Mo. 495; Iron Mountain Bank v. Armstrong, 92 Mo. 280; McKay v. Underwood, 47 Mo. 187; McDonough v. Nicholson, 46 Mo. 35; Cook v. Railroad, 56 Mo. 384; Reed v. Ins. Co., 58 Mo. 429, 430; Vastine v. Rex, 93 Mo. App. 93; Haven v. Railroad, 155 Mo. 229; Van Liew v. Barrett Co., 144 Mo. 509; Drumm-Flato Com. Co. v. Summers, 89 Mo. App. 300; Yates v. Shanklin, 85 Mo. App. 358; Hesse v. Duff, 88 Mo. App. 66.

BLAND, P. J.—The suit is to recover damages alleged in the petition to have resulted from a fall by plaintiff, caused by a defective sidewalk negligently maintained on the side of one of its streets by the defendant city. The answer was a general denial and a plea of contributory negligence. The verdict was for the plaintiff which, on motion of defendant, the court set aside and awarded a new trial, assigning as reasons for its action, first, "on account of newly discovered evidence since the trial," and second, "on the further ground that the verdict is against the greater weight of the evidence in the cause." From the order setting aside the verdict and granting a new trial plaintiff duly appealed.

The evidence is voluminous and we will content

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ourselves with a brief statement of what we find it tends to prove. For plaintiff it tends to prove that on the night of October 17, 1900, she and her husband were walking side by side on the east side of Main street between Jackson and Smallwood streets in the defendant city, when her husband stepped on the end of a loose board in the sidewalk causing it to fly up, and plaintiff, in the act of stepping, caught her foot under the board and was thrown forward, falling on the sidewalk with such force as to knock her senseless for the time being; that after recovering from the immediate shock caused by the fall, with the aid of her husband, she walked to her home (a short distance). She testified that the fall caused her such great pain that she had to take morphine before she could sleep; that since the fall and down to the day of the trial she had suffered almost continuously from severe pain in her back and in the back of her head; that there is a sore spot between her shoulders from which the pain seems to start and then runs into the back of her head like wires; that at times these pains shoot down her spine causing a heavy sensation in her lower limbs and feet and that this condition has continually grown worse since her fall; that she is unable to either sit or stand with her back in an erect position; that prior to and up to the day of her fall she was in good health and flesh, and was strong and weighed from one hundred and sixty-five to one hundred and seventy pounds.

She further testified that she had frequently passed over the sidewalk before her fall and knew that some of the boards in it were loose, and that the walk was out of repair, but it was the usual and direct route to and from her home to the town and she could not have reached her home on the night of her injury without going a considerable distance out of her way; that when she fell she was walking along in the usual way, was looking at the boards in front of her; that the walk was used by other people and she had no idea but that she

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could walk over it in safety. She also testified that about thirteen months prior to falling on the walk she fell about three or four feet down a stairway hurting her right shoulder and that the soreness in her shoulder continued for a few days thereafter, but she suffered no discomfort from the stairway fall and after its occurrence she never had better health in her life up to the time she fell on the sidewalk.

Dr. Jergin testified that plaintiff called on him the last of October or the first of November, 1900, for treatment for the injury she claimed to have received from the fall on the sidewalk; that at the time she complained of intense pain in the back of her neck, head and shoulder; that he prescribed for her and continued to do so until the last of November when he moved away from the town; that he had examined her once since; that there was no change in her condition except in her appearance and loss of flesh; that she was suffering from a nervous affliction known as localized neuritis which could be caused by a fall or shock, and that the injury plaintiff complained of could be caused by the fall she had on the sidewalk and in his judgment the fall did cause the injury. Dr. Jergin's evidence was corroborated by that of Dr. Brown who treated plaintiff in January, 1901.

The sidewalk was constructed by laying three parallel stringers lengthwise on the street and nailing boards crosswise thereon. The evidence for plaintiff is that the stringers in the sidewalk where plaintiff fell were so rotten that they would not hold nails; that some of the boards were loose and that this defective condition was observable to anyone passing over the sidewalk.

The evidence further shows that John F. Beal, a member of the board of aldermen of defendant city, frequently passed over the sidewalk before plaintiff's fall on it. Samuel Randolph testified that he was street commissioner of the defendant city for six years prior

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to May, 1900, and was well acquainted with the sidewalk in question; that it was in bad condition in April, 1900; that in an effort to repair the walk, he drove nails in the stringers to fasten down the loose boards but the stringers were so rotten they would not hold the nails. The evidence also is that the walk was not repaired between the months of April and November, 1900.

For the defendant the evidence tends to show that the surface of the walk appeared to be in good condition and that the stringers were not all rotten, but were partially decayed, and to a casual observer no defects appeared to exist in the sidewalk.

Dr. O'Brien testified for defendant that he lived just across the street from plaintiff in the year 1899 and 1900; that in 1899 plaintiff, in a conversation with him, stated that she had spells with her back and felt feeble; that she had pains through her body and could not endure what she had endured at other times; that she had fallen down stairs and it had injured her very much; that early in the spring of 1900 he had a second conversation with her; that she was carrying a hoe at the time and he said to her that she ought not to do such hard work, and she replied that if she had the strength she once had she would not mind such work, but her health was not as good as it used to be, and she did not have the same endurance as in former years; that since she had fallen down stairs she did not feel quite so well; that he concluded she was suffering from rheumatism and female weaknesses; that he never examined her and never prescribed for her; that she never consulted him as a physician; that he noticed the plaintiff at her ordinary work about her house until up to the time he removed to St. Louis (November 26, 1900). He gave it as his opinion that plaintiff's present condition could not have been caused by the fall on the sidewalk, but was caused by the fall on the stairway and excess of urea in her system.

Dr. Campbell testified that he was consulted by

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plaintiff after she fell down the stairway but not after she fell on the sidewalk, and, in his opinion, her condition was caused by the fall on the stairway which condition was aggravated by the fall on the sidewalk.

Mrs. Freel testified that she met plaintiff after she had fallen down the stairway and plaintiff was all doubled over and said she had fallen down a stairway in a kind of twist and did not believe she would ever get over it, that she got a twist in the fall.

With the motion to set aside the verdict for new trial was filed the affidavit of the city attorney and the affidavits of the newly discovered witnesses. The affidavits of the witnesses are as follows:

"Mrs. Ellen McKendry, on her oath states: That she now resides in the city of Edina, Knox county, Missouri and that she is acquainted with Mrs. Ellen Spaulding, plaintiff in the cause now pending in Knox circuit court wherein the city of Edina is defendant; that she first formed an acquaintance with the said Ellen Spaulding on the 18th day of August, 1898, who was then living in the town of Baring, Mo., at the residence of John Spaulding, who was then living in the city of Edina and with whom affiant was then living and continued to live until about the 17th day of December, 1898. That during that time the said Ellen Spaulding often visited the house of the said John Spaulding who was her father-in-law, and the affiant in conversation with Ellen Spaulding during that time was often informed by the said Ellen Spaulding that she was suffering with great and intense pains in her back and limbs, and that said pains in her back and limbs had been continuous for several years prior to that time; and that owing to the condition of her back she was often in such condition as to render her unable to do anything, and was often compelled to take to her bed. And that said Ellen Spaulding often told the affiant that she, Spaulding, for the last several years, could not on account of the condition of her back and limbs, lift or carry a

bucket of water, or even lift the tea kettle off or on the stove.

"Affiant further says that said Ellen Spaulding was still in that condition, and she so stated that fact to the affiant at the last conversation she had with affiant, about the 15th day of December, 1899, and affiant further says that all the time affiant was living with the family of John Spaulding as aforesaid the health of the said Ellen Spaulding was very delicate, and bad on account of the condition of her back and limbs."

"John Gill on his oath states: That he is acquainted with Ellen Spaulding, plaintiff in the cause now pending in the circuit court of Knox county, wherein the city of Edina is defendant, and is also acquainted with her husband, Clark Spaulding; that on or about the 15th day of July, 1900, the said Clark Spaulding who was then working for affiant informed affiant that his wife, the plaintiff, had that day fallen down the stairway at their residence in the city of Edina, and badly crippled herself, and a few days thereafter, about the 20th day of July, 1900, affiant saw plaintiff Ellen Spaulding, at her said house in Edina, and she then and there told affiant that she had fallen down her own stairway, a few days prior thereto, and badly injured her back and body, and that she was in great pain and misery in her back on account of said fall. And affiant states: That he will testify to the foregoing facts on the retrial of said cause, should the court grant a new trial therein."

"Katie Maloney, on her oath states: That on or about the 15th day of October, 1900, I had a conversation with Clark Spaulding, the husband of Ellen Spaulding, who is plaintiff in the case now pending in the Knox circuit court, wherein the city of Edina is defendant, in which he stated that his wife, the said Ellen Spaulding, had fallen down the stairs and was not able to do anything."

The affidavit of Katie Maloney contains only hear-

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say evidence and should not have been considered. The same remark applies to that portion of John Gill's affidavit detailing what Clark Spaulding told him about his wife falling down stairs.

It seems to us the evidence, in respect to the defective condition of the sidewalk and the knowledge of the city officials of that condition, greatly preponderates in favor of plaintiff, but as to whether or not the diseased condition of plaintiff was caused by her fall on the sidewalk or by the previous fall down the stairway, there is substantial evidence both ways. The jury, however, resolved that issue in favor of the plaintiff. The trial judge, however, was of the opinion that the verdict was against the weight of the evidence and assigned that as one of the reasons for setting aside the verdict. It was said in Kuenzel v. Stevens, 155 Mo. 280, that the power to grant a new trial should be exercised with great care and that it is only when it very clearly appears that the action of the trial court has not been guided by a wise discretion that an appellate court will interfere. In Chouquette v. Railway, 152 Mo. 257, it was ruled that an appellate court will not interfere with the action of the trial court in setting aside a verdict of a jury unless it satisfactorily appears that its discretion has been arbitrarily and unreasonably exercised. The same ruling was made in Bemis Bros. Bag Co. v. Ryan Com. Co., 74 Mo. App. 627. The general rule is that the trial judge should be satisfied with the verdict of the jury, otherwise he should set it aside and grant a new trial (The State v. Young, 119 Mo. 495) and if he is satisfied that the verdict is against the weight of the evidence he should set it aside. Iron Mountain Bank v. Armstrong, 92 Mo. 265; Lawson v. Mills, 130 Mo. 170; Dean v. Fire Ass'n, 65 Mo. App. 209. When a verdict has been set aside by the trial judge for the reason that in his opinion it is against the weight of the evidence, it is only in cases free from doubt that an appellate court will review the discretion of the trial judge. Carr v. Dawes, 46 Mo.

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App. 598; Reid, Murdock & Co. v. Lloyd & Moorman, 61 Mo. App. 646; Mason & Henry v. Onan, 67 Mo. App. 290; McCullough v. Ins. Co., 113 Mo. 606. In Loessing v. Loessing, 88 Mo. App. 494, it was held that an appeal from the ruling of a trial court granting a new trial presents only questions of law for review and does not authorize an appellate court to pass on the weight of the evidence nor to overrule the lower court and in the legitimate exercise of the discretion vested in it to award new trials on the ground that the verdict is opposed to the weight of the evidence. Substantially the same ruling was made in Kansas City Suburban Belt Railway Company v. McElroy, 161 Mo. 584.

In respect to the cause of plaintiff's diseased condition as we have said, the evidence was conflicting. This being so, the exercise of the discretion of the trial court in setting aside the verdict on the ground that it was against the weight of the evidence can not be reviewed by us. This view makes it unnecessary to discuss the other ground assigned by the court for setting aside the verdict.

The judgment is affirmed. *Reyburn* and *Goode*, *JJ.*, concur.

SISSON, Respondent, v. SUPREME COURT OF HONOR, Appellant.

St. Louis Court of Appeals, January 19, 1904.

1. **MUTUAL BENEFICIARY ASSOCIATIONS: Construction of Constitution: Loss of Hand: Jury Question.** In an action for the loss of a hand by the holder of a beneficiary certificate in a mutual benefit association, whose constitution provided that if a member lose a hand, he should receive a certain sum, where the evidence of plaintiff showed that the hand was so injured as to be of no practical use, the question of whether there was loss of the hand was properly submitted to the jury.

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2. ——: ——: Amendment of Constitution. Where a member of such an association, in his application, agreed to conform to the constitution and rules of the order then in force or which might be adopted thereafter, he is bound only by such changes of rules and regulations as relate to his duties as member of the association, and not by changes which interfere with the essential provisions of his contract of insurance, unless such modifications of his contract are made with his express consent.

Appeal from Pike Circuit Court.—*Hon. David H. Eby*, Judge.

AFFIRMED.

James W. Reynolds for appellant.

(1) Plaintiff's application for membership is a part of the insurance contract in this cause. State ex rel. v. Temple Benevolence Ass'n, 42 Mo. App. 485. (2) The application, the certificate and the constitution all make up the contract in this case. Richardson v. Supreme Lodge of Order of Mutual Protection, St. Louis Court of Appeals, Jan. 20, 1903; Morton v. Royal Tribe of Joseph, 93 Mo. App. 78; Grand Lodge v. Elsner, 26 Mo. App. 108; Stater v. Grand Lodge, 76 Mo. App. 387; Grand Lodge v. Stater, 44 Mo. App. 445. (3) The right to amend its constitution is inherent in a corporation of this kind and the members are bound by the amendments. State ex rel. v. Grand Lodge A. O. U. W., 70 Mo. App. 456; Ellerby v. Faust, 119 Mo. 653; St. Patricks' Society v. McVey, 92 Pa. St. 510; Poultney v. Bachman, 62 Howard Pr. 466; Bacon's Benefit Societies sections 91 and 92. Aside from the general doctrine that the right to bind members of such corporations by change in their constitutions, the plaintiff in this cause is especially bound by the change in the constitution because he consented to the change beforehand. State v. Grand Lodge A. O. U. W., 70 Mo. App. 456; Hysinger v. Sup. Lodge K. & L.

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of H., 42 Mo. App. 627. (4) Where a member of a benefit society agrees in his application for membership therein to conform to or comply with the constitution then existing or as it may be thereafter amended, he is bound by any change made in the constitution, if such change is not unreasonable. Richmond v. Supreme Lodge Order of Mutual Protection, supra; Fullenwider v. Sup. Council Royal League, 54 N. E. (Ill.) 485; Sov. Camp. M. W. v. Farley et al., 59 S. W. 879; People ex rel. Goett v. Grand Lodge, 67 N. Y. 330; Chambers v. Sup. T. K. O. T. M., 49 Atl. 784; Lloyd v. Sup. L. K. of P., 98 Fed. 66; Sup. Council, etc. v. Adams, 44 Atl. 380; Theibert v. Sup. L. K. of H., 81 N. W. 220; Masonic Mutual Ben. Ass'n v. Severson, 43 Atl. 192; Sup. T. K. O. T. M. v. Hammers, 81 Ill. App. 560; Niblack, Ben. Societies, p. 50 and 59, sec. 26; Covenant Mut. v. Tuttle, 87 Ill. App. 309; Duer v. Council Chosen Friends, 52 S. W. 109; Loefler v. M. W. A., N. W. 1012; 1 Bacon, Benefit Societies, New Ed., section 91a. Where the constitution —as in this case—specifically reserves the right to alter, change and amend any of its provisions the member who becomes a member under it is bound by any change subsequently made, provided the change is not unreasonable. Niblack, Ben. Soc. (2 Ed.), p. 237; Pain v. Soc. St. Jean Baptist, 52 N. E. 502; Ontario Ins. v. Sup. K. Canada, 19 Canadian Law Times 316; Lawson v. Howell et al., 50 Pac. 763; Hughs v. Ins. Co., 73 N. W. 1015; Bacon's Ben. Societies, New Ed., pp. 185 and 186.

Geo. W. Emerson for respondent.

If the by-laws of 1897 by the terms "loss of hand or foot" meant loss by amputation or dissection of the hand or foot why the necessity of the by-laws of 1900 which reads for the loss of a "hand or foot by amputation at or above the ankle or wrist," etc.? The position here taken is well sustained by the following authority: Sneck v.

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Ins. Co., (Sup.) 34 N. Y. S. 545, 88 Hun 94. If respondent had not lost by physical amputation any portion of his hand, yet, if he lost the use of it in the meaning of the by-laws in question, his hand was lost. Sheanon v. Life Ins. Co., 77 Wis. 618, 46 N. W. 799, Am. St. Rep. 151, 9 L. R. A. 685. Sheanon v. Ins. Co., 83 Wis. 507, 53 N. W. 878. Respondent is not affected nor bound by the amendment made to appellant's by-laws in July, 1900, his certificate having been issued in June, 1897. Hysinger v. Supreme Lodge Knights and Ladies of Honor, 42 Mo. App. 627; Grand Lodge A. O. U. W. v. Sater, 44 Mo. App. 445-452; Lackberger v. Grand Lodge I. O. O. F., 73 Mo. App. 38-41; McMahon v. Maccabees, 151 Mo. 522. Even if respondent's application is a part of his contract, even if the certificate provides that insured shall be bound by any future changes in the law, etc., of the company and even if respondent expressly agreed that he would accept all future changes that might be made in the appellant's laws, etc., yet respondent is not bound by the amendment shown to have been made in this case because the same is a "radical departure from the fundamental plan, and is not a reasonable exercise of the reserved power of amendment. Smith v. Supreme Lodge K. of P., 83 Mo. App. 512; Brown v. Same, 83 Mo. App. 633; Knights Templar's & Mason's Life Indemnity Co. v. Jarman, U. S. Court Reports, 187-190, 47 Law. Ed., page 139.

BLAND, P. J.—The defendant is a mutual benefit association organized under the laws of Illinois and is doing an insurance business on the assessment plan. On June 2, 1897, plaintiff became a member of the defendant association and received a certificate of membership therein, which contains a contract whereby the defendant insured the life of plaintiff in favor of his wife in the sum of two thousand dollars. The certificate of insurance also provides that if plaintiff should become disabled the association will pay him such an

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amount as should be provided by its constitution and by-laws. At the time the certificate was issued, section 1, article 2, of the constitution and by-laws of the association provided as follows:

"If a member lose a foot or hand by accident, he shall receive one-fourth of the amount of his certificate of membership in cash and the other three-fourths at death."

The certificate states that it was issued upon the express condition that the insured should comply with the constitution, laws, rules and regulations of the order then in force or that might thereafter be enacted. In May, 1900, the defendant association amended its constitution by enacting section 106, article 13, which reads as follows:

"If a member lose a foot or hand by accident, resulting in amputation or severance at or above the ankle or wrist, he shall receive one-fourth of the amount of his certificate of membership in cash."

On October 24, 1901, plaintiff, while pursuing his usual avocation (operating a brick plant) accidentally caught his left hand under a brick press and it was severely lacerated and injured. The suit was to recover for the loss of the left hand. Plaintiff recovered a judgment of $500 from which the defendant appealed.

There are but two questions presented by the briefs and arguments of counsel (all other questions arising at the trial are conceded to have been correctly resolved in favor of the plaintiff). The first question is, does the evidence show that plaintiff lost his hand within the meaning of the certificate of insurance? The evidence is that the brick press came down on plaintiff's left hand and mashed off the two middle fingers at the knuckle joint and the index finger above the second joint.

Dr. T. E. Walter testified that he was called to treat the injury at the time it happened and that he found the hand pretty badly mashed up, but not so badly injured as to require an amputation of the entire hand in

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his judgment; that he and Dr. Love amputated the second and third fingers at the knuckle joint and the index finger at the second joint; that for all practical purposes the hand is lost; that the stub of the index finger is stiff and can not be used for any purpose and it would have been better if it had been amputated at the knuckle; that there was still a partial action of the little finger and thumb but their action was impaired by the injury to the leaders in the back of the hand.

Plaintiff testified that the circulation in his hand was bad; that his hand got cold and even in hot weather he had to keep it in his pocket or hold it in his right hand to keep it warm; that it was weak and got tired very soon when he attempted to use it; that he used it all he could but found it was practically useless as a hand; that he was keeping a small general store and assisted his wife in selling goods but could not use his left hand to tie up packages; that he could lift light articles for a little while with it but in trying to handle queensware, such as cups and saucers and plates, he would let them fall, they would slip out of his hand and he could not hold on to them; that the leaders in the back of his hand seemed to be drawn and on account of this he could not bend his little finger without pain, and that his thumb was weak and the thumb and little finger were of very little use; that he never gave his consent to the passage of section 106, article 13, supra, and did not know that any change had been made in the constitution until after he had received his injury.

There was countervailing evidence not material to be noticed in this discussion as the question for solution is, should the court have nonsuited the plaintiff on his own evidence? In other words, does the evidence introduced on behalf of plaintiff tend to show that he lost his left hand within the meaning of the certificate of insurance? The term "accidentally" in a policy, it has been repeatedly held, is used in its ordinary and popular sense. United States Mutual Accident Association

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v. Barry, 131 U. S. 100; North American Life & Accident Insurance Company v. Burroughs, 69 Pa. 43.

In Sheanon v. Pacific Mutual Life Ins. Co., 77 Wis. 618, it was held that the entire destruction of both a person's feet by paralysis, caused by an accidental pistol wound in the back, was within the provisions of an accident insurance policy, providing for the loss of two entire feet, notwithstanding they were not amputated from the body.

In Sneck v. Traveler's Ins. Co. of Hartford, 88 Hun 94, the plaintiff was injured by an accident. His insurance policy provided for the payment of certain sums if by certain enumerated causes he should lose an entire hand by severance. The evidence tended to show that about one-half of plaintiff's hand, anatomically considered, was cut off by a planer, but that the rest of the hand was absolutely useless. Plaintiff was nonsuited by the trial court. On appeal the Supreme Court of New York said that inasmuch as some men might conclude from the evidence that for all practical purposes to which a hand is adapted there was an entire loss of the use thereof; while others might consider that neither in its anatomical construction nor in its practical use as a hand was it entirely destroyed, the question was one of fact for the jury and it was erroneous for the court to decide it as a matter of law.

We are of the opinion that the phrase, "should lose a hand," used in section 1, article 12, of the constitution of the defendant association, in force when plaintiff received his certificate of insurance, was used in its ordinary and popular sense and does not mean that there should be a total destruction of the hand, anatomically speaking, but that the loss of the use of it for the purposes to which a hand is adapted would be a loss of it, within the meaning of section 1, supra, of the laws of the society. The physician who operated on his hand and treated it afterwards testified that it was lost in the sense that it was of no practical use. The evidence of

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the plaintiff is such as to show that the hand is more a source of inconvenience and annoyance than of utility, and that for the purposes to which a hand is adapted it is practically useless. In the light of this character of evidence, we think the question of whether or not there was a loss of the hand was properly submitted to the jury.

The second question presented for solution is whether or not the contract of insurance must be interpreted by section 1, article 12, of the constitution in force at the time of its issuance or by the amendment of May, 1900. In his application for membership and insurance plaintiff agreed to conform in all respects to the constitution, laws, rules and usages of the order then in force or which might be adopted thereafter by the supreme council of the association. By reason of this agreement and a similar one in the certificate of membership and insurance it is contended that plaintiff is bound by section 106, article 13, supra, passed in May, 1900, and could not recover for the reason he had not lost his whole hand. In the case of Morton v. Supreme Council of Royal League, 100 Mo. App. 76, 73 S. W. 259 Judge Goode of this court made an exhaustive review of the authorities on this question, citing numerous cases in this and other States and conclusively demonstrated that the doctrine is well established that stipulations in a contract of insurance like the one in hand, to comply with future by-laws and regulations, mean the member will comply with such by-laws, rules and regulations as relate to his duties as a member of the association, but do not mean that the society may interfere with the essential provisions of the contract of insurance, and that it is powerless, by by-laws or otherwise, to change or modify the essentials of the contract of insurance without the express consent of the member. We adhere to this ruling and hold that the certificate of insurance is in nowise affected by section 106, article 13, supra.

The judgment is affirmed. *Reyburn* and *Goode, JJ.*, concur.

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BRIGGS, Appellant, v. MORGAN, Respondent.

St. Louis Court of Appeals, January 19, 1904.

1. **SALES: Quantum Meruit: Apportionable Contract.** Where one entered into contract to deliver a certain quantity of hay, by installments and delivered only a portion of the same, he can not sue on the contract, but may sue in assumpsit for the value of the hay delivered.

2. ———: ———: ———: **Set-Off.** And if the other party was damaged by plaintiff's failure to comply with his contract, he can plead such damage as a set-off.

Appeal from Scotland Circuit Court.—*Hon. E. R. McKee*, Judge.

REVERSED AND REMANDED (*with directions*).

Smoot, Boyd & Smoot for appellant.

Smith v. Keith & Perry Co., 36 Mo. App. 567; Halpin Mfg. Co. v. School Dist., 54 Mo. App. 380; West v. Freeman, 76 Mo. App. 101; Dempsey v. Lawson, 76 Mo. App. 526; Freeman v. Taylor, 62 Mo. App. 617; Cahill & Co. v. Orphan School, 63 Mo. App. 33; Halpin Mfg. Co.v. School Dist., 54 Mo. App. 380.

John M. Doran for respondent.

(1) Where a contract is entire there can be no recovery for a partial performance of it. Bersch v. Sander, 37 Mo. 104; Barrie v. Seidel, 30 Mo. App. 559; Posey v. Garth, 7 Mo. 94; Henson v. Hampton, 32 Mo. 408; Schnerr v. Lemp, 19 Mo. 40; Aaron v. Moore, 34 Mo. 79; Earp v. Tyler, 73 Mo. 617. (2) Where the contract is an entire one and a part of the goods is delivered

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the vendee may be liable for that part, but this is only where a new contract can fairly be implied. Murphy v. St. Louis, 8 Mo. App. 485.

BLAND, P. J.—The suit originated before a justice of the peace on the following account:

"Oscar Morgan, Dr. to Wm. D. Briggs.

1902, Nov. 15, Hay, 2050 lbs.

1902, Dec. 1, Hay, 3125 lbs.

"Total, 5175 lbs. at $8.00 per ton, $20.70."

From a judgment recovered by plaintiff before the justice defendant appealed. On the trial in the circuit court defendant admitted that he had received the number of pounds of hay sued for and that he had agreed to pay eight dollars per ton for the hay. His defense was that he had contracted with plaintiff for ten tons of hay at eight dollars per ton to be delivered from time to time during the winter of 1902 and 1903, and that the plaintiff failed and refused to deliver all the hay. Defendant assumed the burden of proof. His evidence tended to prove that he contracted with plaintiff for ten tons of hay at eight dollars per ton, the hay to be delivered during the winter of the years 1902 and 1903; that after delivering the hay sued for, the plaintiff refused to let him have any more hay. On this evidence and the following instruction given by the court, the jury found the issues for the defendant:

"The court instructs the jury that if you believe from the evidence that the plaintiff contracted with the defendant to sell the defendant ten tons of hay for the price and the sum of eight dollars per ton, and nothing said about when payment to be made, to be delivered to the defendant during the winter of 1902 and 1903, then said contract was an entire contract and plaintiff can not recover for a partial performance thereof, and if you find from the evidence that plaintiff after having delivered a part of said hay refused to deliver the remain-

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der, then the plaintiff can not recover and your verdict should be for the defendant."

Plaintiff within four days after the rendition of the verdict, filed his motion for new trial. The court offered to grant plaintiff a new trial if he would agree that the verdict might be set aside at his cost. The plaintiff declined to accept the terms offered by the court, whereupon the court overruled his motion and plaintiff perfected his appeal.

Where a contract is apportionable, as is a contract to deliver ten tons of hay by installments or at different times, if the party to make the delivery, without fault of the other party, fails to deliver all the hay but delivers a portion of it and the portion delivered is accepted and used by the other party as was the hay sued for, the party making the partial delivery is not entitled to sue on the contract, but may sue in assumpsit for the value of the hay delivered and accepted under the contract and recover its value not exceeding the contract price. Smith v. Coal Co., 36 Mo. App. 567, and cases cited; Halpin Mfg. Co. v. School District, 54 Mo. App. 371; Dempsey v. Lawson, 76 Mo. App. 522. If the other party was damaged by the failure of the party suing to deliver all the hay contracted for, he may plead such damages as a set-off. The trial court misconceived the law of the case and erroneously instructed the jury, and should have granted the motion for new trial without imposing terms upon plaintiff. On the admission of defendant that he received the hay and agreed to pay the price charged, there being no set-off filed, the jury should have been instructed to find for the plaintiff.

The judgment is reversed and the cause remanded with directions to the lower court to enter judgment for plaintiff for $20.70 with six per cent interest per annum thereon from the date the suit was commenced before the justice. *Reyburn* and *Goode, JJ.*, concur.

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WHITECOTTON, Respondent, v. THE ST. LOUIS & HANNIBAL RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, January 19, 1904.

1. **APPELLATE PRACTICE: Defect of Parties: Raised by Answer.** A defendant can not object that there is a defect of parties plaintiff on appeal, when he has failed to raise the point in his answer and his answer shows that he knew the facts at the time it was filed.

2. **PRACTICE: Parties: Trespass: Prior Incumbrances.** In an action against a railway company for the value of ground used by it as a right of way, where the plaintiff had acquired title to the ground under the foreclosure of a deed of trust, the trustee in a prior deed of trust on the land was not a proper party, such prior deed of trust having been discharged before defendant answered.

3. **TRESPASS: Title of Plaintiff: Equity in Stranger no Defense.** It is no defense to an action against a railway company for the value of land taken by it for right of way, to allege that plaintiff's title is defective by reason of an equitable right in a stranger arising from a contract, where defendant was not a party to the contract and it was not made for defendant's benefit.

4. **———: Measure of Damages: Mortgage, Purchaser Under: Title Relates Back.** In an action against a railway company for the value of ground taken for right of way through plaintiff's farm, where plaintiff acquired title under the foreclosure of a deed of trust after the railroad was located through the land, though the deed of trust was executed prior to that time, plaintiff's title relates back to the date of the deed of trust so that he may recover the value of the land actually taken, though he can not recover for incidental damages to the farm.

Appeal from Ralls Circuit Court.—*Hon. D. H. Eby*, Judge.

REVERSED AND REMANDED.

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George A. Mahan and *J. D. Hostetter* for appellants.

(1) A party can recover only on a cause of action existing at the date of the institution of his suit, and even though by reason of events transpiring subsequent to the filing of a suit, a plaintiff may acquire a cause of action, yet the test of a defendant's liability relates back to the time of the institution of the suit, and a plaintiff can not recover on a subsequently acquired cause of action even by an amendment of his petition. Boatmen's Sav. Bk. v. McMenamy, Admr., 35 Mo. App. 206; Brown v. Shock, 27 Mo. App. 355; Mason v. Barnard, 36 Mo. 391; Tobin v. McCann, 17 Mo. App. 481; Jennings v. Zerr & Jennings, 48 Mo. App. 528; Turk v. Stahl, 53 Mo. 437; Cheatam v. Lewis, 3 Johns. 43; Freimuth v. Rupp, 8 Mo. App. 568; Weinwick v. Bender, 33 Mo. 83; McDowell & Co. v. Morgan, 33 Mo. 556; Bank v. Porterfield, 70 Mo. App. 573; Fisher v. Stephens, 143 Mo. 181; (2) After condition broken the legal title to lands covered by deed of trust, vests in the trustee named in the deed of trust, so much so, that it has been held that a trustee may before sale maintain ejectment. Siemers v. Schrader, 88 Mo. 20; Johnson v. Houston, 47 Mo. 227; Hospes v. Almstedt, 13 Mo. App. 274; State ex rel. Peters v. Koch, 47 Mo. 582; Picket v. Jones, 63 Mo. 195; Bailey v. Winn, 101 Mo. 649; Matthews v. Ry. Co., 142 Mo. 645. (3) And it has been held that a trustee, mortgagee or a beneficiary in a deed of trust, may maintain an action for trespass committed on the mortgaged premises before entry or foreclosure. Girard Life Ins. Co. v. Mangold, 94 Mo. App. 129; s. c., 83 Mo. App. 281; Heitkamp v. LaMotte Granite Co., 59 Mo. App. 244. (4) The trial court erred in striking out a portion of defendant's amended answer and in excluding testimony proffered by defendant in support of the allegations thus stricken out. A mortgage or a deed of trust is a mere security for the payment of a debt, and

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when the debt is extinguished the lien of the mortgage or deed of trust, together with all their ordinary incidents fail. Hudson Bros. v. Glencoe Gravel Co., 140 Mo. 103. (5) The theory on which a mortgagee or the beneficiary in a deed of trust has been held to have the right to recover damages for trespasses on the mortgaged premises occurring after maturity and before foreclosure is because the impairment of the security resulted in a loss on the debt. Girard Life Ins. Co. v. Mangold, 94 Mo. App. 129; s. c. Mo. App. 281; Chouteau v. Broughton, 100 Mo. 406; Heitkamp v. LaMotte Granite Co., 59 Mo. App. 244. (6) Levering, the beneficiary in the three deeds of trust, acquiesced in the arrangement between Briggs and the railway company constructing the road through the premises, and in standing by and permitting the company to pay Briggs (and himself, for that matter, because it enhanced the value of his security) for the easement, by building and maintaining a switch and station on the premises, he, and plaintiff, who claims under him, are both in equity and good conscience estopped from now asserting a claim for damages against defendant. Cory v. Railroad, 100 Mo. l. c. 293; Dodd v. Railroad, 108 Mo. 581; Gray v. Railroad, 81 Mo. 126; McClellan v. Railroad, 103 Mo. 313. A deed conveying to a railroad company land for right-of-way and station ground purposes is as effectual, and is the same as acquirement of the same by condemnation proceedings. Venable v. Railroad, 112 Mo. 124; Kane v. Railroad, 112 Mo. 34.

Reuben F. Roy for respondent.

(1) We admit that plaintiff must have a cause of action at date of institution of suit. We admit that after default, the trustee or beneficiary may maintain ejectment or trespass. But we deny that a stranger to the mortgage or deed of trust can set it up for the purpose of defeating the title of the mortgagor. The de-

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fendant herein is not a party to said deeds of trust and claims adversely to them. Hardwick v. Jones, 65 Mo. 60; Kennett v. Plummer, 28 Mo. 145; Woods v. Hilderbrand, 46 Mo. 284. (2) No error was committed by the court in striking out defendant's answer. Fowler v. Fowler, 78 Mo. App. 334; Wolf v. Walter, 56 Mo. 295; Norton v. Highleyman, 88 Mo. 624; Williams v. Perkins, 83 Mo. 379; Implement Co. v. Jones, 143 Mo. 281; School District v. Livers, 147 Mo. 580. (3) In order that a third party may enforce the provisions of a contract it should appear: First, that it was made with the intention that he should be benefited by it; or, second, the obligee should owe the third party some obligation to do the thing provided for. Keet v. Baker, 141 Mo. 175; Armstrong v. School District, 28 Mo. App. 169; City of St. Louis v. Von Phul, 133 Mo. 565. (4) The purchaser at foreclosure sale purchases all the rights of the grantor and beneficiary in the deed of trust freed from all junior encumbrances, liens and easements and takes the same title conveyed in the deed of trust. Lindenbauer v. Bentley, 86 Mo. 578; Meier v. Meier, 105 Mo. 411; Plum v. Studebaker, 89 Mo. 162. (5) It destroys all easements granted by mortgagor subsequent to the deed of trust under which foreclosure was made. Simpson v. Railroad, 145 Mo. 80. (6) More than all that, the plaintiff's title relates back to the date of the trust under which he purchased. Booker v. Allen, 153 Mo. 620.

GOODE, J.—Judgment was given against the appellant for the value of a strip of ground used by it as a right-of-way through a farm owned by the respondent; and the judgment is now assailed for reasons arising on the mode in which the respondent acquired the farm which previously had belonged to Geo. W. Briggs. While Briggs owned it he gave three deeds of trust on it to William Christian as trustee for A. R. Levering, and subsequently, in 1891, and 1892, made quitclaim deeds

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to the St. Louis, Hannibal and Kansas City Railroad Company, predecessor of the appellant, for the strip whose value is the subject-matter of this litigation, said predecessor having conveyed the strip to the appellant in May, 1893. Besides the deeds of trust in favor of Levering, Briggs subsequently executed three other deeds of trust in favor of the Ralls County Bank. The last one given for Levering's benefit, was foreclosed by sale February 2, 1899, and the farm purchased by the respondent, Mr. Whitecotton, who afterwards began the present action. After it was begun, but before trial or answer filed, the two earlier Levering deeds of trust were paid by the bank. The appellant contends that as those first deeds were in force when the action was begun, and as their conditions had been broken, the right of action for the value of the strip was then in the trustee Christian, instead of Whitecotton, the purchaser under the third Levering deed. If there was a defect of parties on account of the interest of said trustee in the proceeds of the litigation, the objection should have been made in the answer; for the appellant recited the deeds of trust prior to the one under which the respondent purchased, but raised no point on them against Whitecotton's right to sue, as it should have done to be able to take advantage of such a point on appeal. Appellant's answer shows it knew the facts when the answer was filed; hence it should have objected then so that Christian could have been made a party to the action, if necessary. Stewart v. Gibson, 76 Mo. App. 206.

But before the appellant answered, the prior deeds of trust had been discharged and the trustee, after their discharge, had no further interest in the land, the appellant was in no danger of an action by him to recover the value of the right-of-way, and he was not a necessary party, nor even a proper one; as was decided in a case like the present one in respect to the question of parties. Mathews v. Railroad, 142 Mo. 645.

It is said the respondent's right of action must have

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been complete when he sued and that if it was not, his action must fail. The argument in this connection is that the right to sue for the value of the right-of-way was in Christian as trustee in the first two deeds of trust, to the exclusion of Whitecotton's right as purchaser at the sale under the third one. The Mathews case is decisive of this contention, which involves the erroneous notion that, when there are several mortgages on land, no one but the first incumbrancer, or his trustee, can maintain an action for the land, or its value, if wrongfully taken, or for waste committed on it. The effect of such a rule would be to render junior incumbrancers and the mortgagor himself, helpless against an ouster or trespass submitted to by the first incumbrancer, though they, as well as he, are interested in keeping the freehold in possession and unimpaired. The owner is thus interested because of his right of redemption, and the junior mortgagees because the land is their security. We have no call to expatiate generally, in this opinion, on the law of successive incumbrances, or to determine when, if ever, the senior incumbrancer is a necessary party to an action to recover the land, or its value, or damages for an injury to it; and will rest content with quoting a passage from the opinion in the Mathews case, which disposes of the point we have to decide:

"It is unnecessary to inquire, in this case, whether the trustee was a necessary party to the suit when instituted for the secured debt was paid before the trial, and the trustee at that time, at least, was neither a necessary nor a proper party. Plaintiff, as the substantial owner of the farm when the barn was burned, was the real party damaged; neither the trustee nor the secured creditor is complaining, and we are unable to see that defendant, who is in nowise interested in the deed of trust, has a right to complain after satisfaction of the debt. If the defendant is liable for the damages, there can be no difference to whom it is paid if payment dis-

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charged the liability and is a bar to an action by another party."

Among other things, the railroad company answered that when Briggs made a quitclaim deed to the farm to the Ralls County Bank, as he did March 2, 1894, the bank agreed with him to pay the Levering deeds of trust, and that it thereupon became its duty to do so, instead of letting the farm go to sale under one of them; that Whitecotton was an officer of the bank, purchased at the deed of trust sale, with money of the bank, for its benefit, stands in its shoes, and, therefore, can not maintain the present action, for the reason that permitting the sale of the land and purchasing it through its representative, were acts done by the bank in violation of its agreement with Briggs to discharge his indebtedness secured by the deeds of trust. The gravamen of this contention is that Whitecotton acquired no title by his purchase, as the bank simply paid a debt which it had assumed and made its own when he bought for the bank at the foreclosure sale. This matter of the answer was stricken out on appellant's motion, and error is assigned as to that ruling.

Whitecotton acquired title by the trustee's deed executed to him as the purchaser at the sale, granting, for argument's sake, that Briggs could have had the sale set aside because of the supposed agreement. His title was good until it was divested at the instance of the person possessed of an equity against it. Springfield E. & T. Co. v. Donovan, 120 Mo. 423; Simerson v. Bank, 12 Ala. 205. As he acquired the title and under a conveyance which was prior and paramount to those by which the defendant acquired its right-of-way, he is in a position to recover the value of the right-of-way unless, by virtue of the alleged agreement, the appellant has an equitable defense, or set-off, against him. But it is apparent that Briggs was the only person aggrieved by the bank's breach of contract in failing to pay his indebtedness and thereby discharge the liens on the land,

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and that any demand for damages on that score belongs to him and is not available to the appellant by way of defense, set-off or counterclaim. The railway company was no party to the alleged contract, nor was the contract entered into by Briggs for its benefit. It does not even enjoy any covenant by virtue of which it can assert a right as Brigg's covenantee; since it holds under quitclaim deeds. As no one but a party to a contract, or one for whose benefit it was made, can sue on it, the rejected matter of the answer stated no defense in favor of the railway company. Howsmon v. Trenton Water Co., 119 Mo. 304; Roddy v. Railway, 104 Mo. 234.

A complaint is preferred because the court, in assessing respondent's damages, allowed as damages not only the value of the ground taken, but the injury done to the remainder of the farm by locating and making the road through it, less the value of the peculiar benefits, if any, accruing to the farm. It is the appellant's view, that as plaintiff did not own the land when the entry for right-of-way purposes was made, he can not recover incidental damages. We regard this position as well taken. Whitecotton's purchase at the foreclosure sale gave him the right to recover the value of the right-of-way, because it vested the title to it in him. But he bought the remainder of the farm for a price which it is fair to presume, was diminished from what it would have brought but for the location of the railway, if that event unfavorably affected its value. To permit him to recover incidental damages in this action would, therefore, be giving him those damages twice. This proposition was discussed and decided in Livermon v. Railroad, 109 N. C. 52, and the purchaser at the mortgage sale ruled to have no right to such incidental damages. Those damages might have been demanded by the mortgagee Levering as an impairment of his security, or by Briggs, the owner of the farm. But if they chose to pass them by, a subsequent purchaser has no just claim to them. It is said by the respondent that his title relates

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back to the date of the deed of trust under which he bought, and it does for some purposes (Booker v. Allen, 153 Mo. 613); but not so as to clothe him with a right to recover for waste or injury to the freehold. His title is good as of that date; but incidental injuries to the freehold committed previous to his purchase, in no manner impair his title nor detract from what he bought. It is because of the relation of his title that respondent is entitled to recover for the ground taken for a right-of-way. He bought that ground as much as any; but he did not buy any demand for incidental injury to the remainder of the farm. He simply bought the remainder as it was. Suppose timber had been cut off the farm before respondent purchased it; could he recover its value? Plainly not. The remedy for such losses belongs to the owner and to the mortgagee. 1 Jones, Mortgages (5 Ed.), secs. 659, et seq. We think the respondent's recovery should be the value of the land appropriated by the defendant.

The judgment is, therefore, reversed and the cause remanded. *Bland, P. J.*, and *Reyburn, J.*, concur.

OLIVER, Plaintiff-Appellant, v. LOVE et al., Defendants-Appellants.

St. Louis Court of Appeals, January 19, 1904.

1. **PRACTICE: Counterclaim: Instructions: Burden of Proof.** Where, in an action on a note, a counterclaim containing several items was filed by defendants, and plaintiff replied admitting certain of such items, an instruction that the burden was on defendants to prove each and every item of their counterclaim by the greater weight of evidence, was properly refused.

2. ———: **Peremptory Instruction.** Where the evidence was susceptible of an inference contrary to plaintiff's contention on a certain issue, a peremptory instruction to find for him on that issue was properly refused.

3. ———: **Instruction: Presumption.** In an action on a note, where there was a counterclaim and it was a matter of dispute whether some items of the counterclaim were included in a settlement which was had at the time the note was given, it was proper to refuse an instruction to the effect that there was a presumption of law that defendant owed the amount of the note at the time of its execution.

4. **INTEREST: Judgment on Counterclaim.** In an action on a note in which a counterclaim was filed, where the jury found the amount due both on the note and the counterclaim, striking a balance, the finding on the note was afterwards set aside, leaving the finding on the counterclaim undisturbed, and a new trial was had at a subsequent term on the note: *Held*, interest should have been allowed on the amount found due on the counterclaim from the date of the first verdict, in striking the balance between the two claims.

Appeal from Louisiana Court of Common Pleas.—*Hon. D. H. Eby,* Judge.

REVERSED AND REMANDED (*with directions*).

James W. Reynolds for plaintiff-appellant.

(1) Defendants' counterclaim or set-off was in effect a separate suit by him against the plaintiff (section 4499, R. S. 1899). This being true, plaintiff, as to the disputed items in set-off, is to be considered as plaintiff in this cause. As such it devolved upon him to prove the fact of the correctness of the various disputed items in his counterclaim, and the failure of the court to declare this to be the law as asked in plaintiff's refused instruction No. 2 was prejudicial error. Grover v. Henderson, 120 Mo. 367; Blum v. Shoe Co., 77 Mo. App. 367. (2) Aside from these points the action of the court in overruling defendants' motions for judgment was not error. The issue of fact as to the amount due on the note was a matter for the jury and not the

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court unless the jury was waived. R. S. 1899, sec. 691. The amount due on the note had to be determined as the result of the calculations of the jury, not the court. Dyer v. Combs, 65 Mo. App. 148. (3) Defendants' remaining assignment of error is that the trial court refused to allow them interest on the verdict. They very discreetly omitted all the pleadings from their so-called abstract of the record. Neither of their answers in the cause state or pray for interest and they can not complain now if they are required by the law to lie in the bed of their own choice. Shockley v. Fisher, 21 Mo. App. 551; Patterson v. Mo. Glass Co., 72 Mo. App. 492; State ex rel. v. Gold Spring Distilling Co., 72 Mo. App. 573; Givin v. Refrigerator Co., 66 Mo. App. 315; Bradley & Co. v. Asher, 65 Mo. App. 589; Martin v. St. Louis, 139 Mo. 246.

Matson & May for defendants-appellants.

(1) Judgment. It being the manifest intention of the jury to render a verdict for the difference between the actual balance due on plaintiff's note sued on and the amount the jury found to be due defendants on the set-off, and "it appearing to the court by the pleadings in the case that the amount due plaintiff on the note sued upon was susceptible of accurate determination by ordinary computation" and by ordinary computation the difference was in favor of defendants, the court should have sustained defendants' motion for judgment and entered an affirmative judgment in favor of defendants for the said difference. Hackworth v. Zeitinger, 48 Mo. App. 32. The adjudged cases show that ever since the reign of Charles I. the courts have exercised freely the power of amending verdicts of juries so as to correct manifest errors, both of form and substance. Acton v. Dooley, 16 Mo. App. 448. (2) Mr. Justice Story lays down the broad rule in respect to amendments of verdicts that the court may make amendment of verdict and is only limited in so doing to the rule

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that the amendment must be such as to make the verdict conform to the real intention of the jury. Ib., supra; Fay & Co. v. Richmond, 18 Mo. App. 363; Provo Mfg. Co. v. Severance, 51 Mo. App. 260; Cox v. Bright, 65 Mo. App. 421. Case in which verdict was in excess of amount recoverable, court allowed a remittitur, computed correct interest and rendered judgment — held correct. McCormick v. Hickey, 24 Mo. App. 367. Where the amount of the verdict is larger or smaller than that admitted to be due, or which must be the extent of defendants' liability, if liable at all, it has been held that the amount of the verdict is a matter of law for the court. 22 A. & E. Ency. Pl. & Pr., 915. (3) Interest. Creditors allowed to receive interest. R. S. 1899, sec. 3705. Interest on amount of verdict. Where the party against whom a verdict in an action on an interest-bearing claim has been recovered, delays the award of judgment by some act of his own, as by motion for new trial or in arrest of judgment, the prevailing party should be allowed interest on the amount of the verdict from the date of its rendition. 28 Am. and Eng. Ency. Law, p. 317—and numerous cases therein cited. In Kinter v. State, 3 Ind. 86, interest was allowed on an award, and the conclusion drawn in 28 Am. and Eng. Ency. Law, 317, that the reasoning would apply with the same force in case of a verdict. In Martin, Exr. v. St. Louis, 139 Mo. 246, interest was allowed on award. Gest v. Cincinnati, 26 Ohio St. 275; Gibson v. Cincinnati Inquirer, 2 Flip. (U. S.) 88. See also, Griffith v. Railroad, 44 Fed. Rep. 574; People v. Gaine, 1 Johns. (N. Y.) 343; Dowell v. Griswold, 5 Sawy. (U. S.) 39. A year after suit was brought plaintiff recovered a verdict, and a reference was ordered to ascertain the amount due. Twenty years delay occurred, but not through plaintiff's fault. Held, that he was entitled to interest. Bartels v. Redfield, 27 Fed. Rep. 286. Interest on the amount of a verdict may be allowed from the date of the verdict to the date of the

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judgment, when entry of judgment is delayed by a motion for new trial. Equitable Life v. Trimble, 83 F. 85, 27 C. C. A. 404; Freemont, etc., v. Root, 69 N. W. 397; Hilton v. State, 83 N. W. 354; Railway v. Fox, 83 N. W. 744.

GOODE, J.—Both the parties to this action appealed and their appeals have been consolidated.

Plaintiff sued the defendants on a promissory note dated November 10, 1897, bearing interest from date at the rate of eight per cent, compounded if not paid annually. The execution of the note was admitted by the defendants, as were certain payments on it which were enumerated in the petition. Their answer, after making these admissions, averred that the note had been paid and discharged prior to the institution of this action.

A counterclaim was declared on by the defendants, consisting of various items amounting to $213.35. It was made up of a running account based on sales of grain to the plaintiff, pasturage for cattle, differences due the defendants on cattle trades, and other transactions which need not be stated. A replication was filed in which it was averred that the account between the parties was converted into an account stated for $530, by a settlement between the parties prior to the execution of the note in suit; that at the time the account was stated and the note executed, it was agreed the note should be in full settlement of all past transactions and dealings between the parties. The replication says further, that five of the items in the counterclaim, amounting to $108, were included in the settlement. Certain other items of the counterclaim are then enumerated in the replication, whose total plaintiff concedes the defendants were entitled to be credited with on the note and avers that the balance due thereon is $183.07.

It thus appears that as to part of the items in the

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counterclaim there was no controversy and this disposes of one of the plaintiff's assignments of error, to-wit; the circuit court's refusal of an instruction asked by the plaintiff that the burden was on the defendants to prove each and every item of their counterclaim and that if they failed to prove any of them by the greater weight of the evidence, the verdict should be for the plaintiff for all of those not thus proved. This charge was wrong; for while it was incumbent on the defendants to establish by a preponderance of the evidence, the validity of the disputed items, it was not incumbent on them to prove the undisputed ones.

One item of the counterclaim was for $17.60, for three hogs, alleged to have been sold to plaintiff by defendants May 10, 1896. Two instructions were asked by plaintiff as to this transaction, to the effect that the finding on it must be for the plaintiff. Those instructions were refused, the plaintiff says, erroneously. His argument is that the undisputed evidence shows the three hogs were sold by the defendants to Tim Lambertson and by Lambertson to Oliver, instead of being sold by the defendants to Oliver; that, therefore, Oliver did not owe the defendants for the hogs.

The evidence is that just as Lambertson had purchased from the defendants a bunch of hogs, including the three in dispute, Oliver came up and said he would like to have those three, and Lambertson agreed he might have them. They were separated from the others and Oliver drove them off. The testimony is certainly susceptible of the inference that, instead of Lambertson selling the hogs to Oliver, he waived his right to them and allowed the defendants to sell them to Oliver, which they did, Oliver acquiring them by a purchase from the defendants and becoming thereby indebted to the defendants. We, therefore, overrule the assignment of error based on the refusal of the instructions directing the jury to find for the plaintiff on this item of the counterclaim.

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It is asserted the court erred in refusing to charge the jury that there was a presumption of law that the defendants owed Oliver $500 at the time they executed the note in suit and, consequently, unless the defendant had shown, by the weight of the evidence, that some of the items of the counterclaim were not embraced in said settlement, the verdict should be for the plaintiff on the counterclaim. The court instructed the jury to disallow such items of the counterclaim as they might find from the evidence were included in the settlement, and this was a sound instruction. It was not proper to instruct that there was a legal presumption as to how much the defendants owed the plaintiff at the date of the settlement,when there was evidence from which they were to find what was then owing and what transactions were included in it. Haycraft v. Grigsby, 88 Mo. App. loc. cit. 362.

The only point in this appeal of doubt, or deserving any comment, arises on the contention that the defendant J. D. Love was entitled to interest from the date of the verdict to the rendition of final judgment, on the amount found by the jury in his favor on the counterclaim. To make this point intelligible, the course the case took in the circuit court must be stated: At the first trial the jury found a verdict for the plaintiff on the note in the sum of $190.98 and in favor of the defendant J. D. Love, on the counterclaim for $185.35, assessing plaintiff's damages at the difference between the two amounts, to-wit: $5.63. Judgment was entered in accordance with this verdict. That verdict was returned June 4, 1902. On the same day plaintiff filed motions for new trial and in arrest. On June 4, 1902, defendants filed a motion asking the court to amend the verdict and correct the judgment, stating, in support of the motion, that the verdict on the note was for more than the petition asked, and that the amount actually due on it was $184.24, instead of $190.98, as found by the jury; that it was the plain intention of the jury to

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render a verdict for the difference between the amount actually due and the amount of the counterclaim, and the court was prayed to find the difference and enter judgment for it. On June 28, 1902, the court overruled said motion; but having found the verdict to be inaccurate, and that the true amount due on the note could be found by computation, it entered an order that unless the plaintiff would remit the excess of the verdict in his favor, it would set it aside. Plaintiff refused to enter a remittitur and the finding on the note was set aside but not the finding on the counterclaim, which was left standing. At the same term, plaintiff's motions for new trial and in arrest were overruled and he appealed. It seems the defendants filed another motion, admitting the amount due on the note was the balance that would remain after deducting the credits indorsed on it, and praying that it be computed and judgment entered in accordance with the finding and verdict of the jury. This motion the court refused to pass on and defendants excepted. Plaintiff dismissed his aforesaid appeal on June 28, 1902, and on December 8, 1902, the mandate of this court showing the dismissal, was filed in the circuit court. On December 27, 1902, the circuit court continued the case on its own motion to the next term. At the next term, to-wit; in June, 1903, the defendants' last motion for judgment was overruled and they excepted. On June 5, 1903, the case was continued on plaintiff's application, until June 30, at which date plaintiff's cause of action was tried before the court, resulting in a finding in his favor for $188.41, which was $3.06 in excess of the amount found by the jury in favor of J. D. Love on the counterclaim; so judgment was entered in favor of the plaintiff for the said sum of $3.06. The circuit court refused to allow said defendants interest from the date of the verdict, June 4, 1902, to June 30, 1903, when final judgment was rendered on the amount found by the verdict to be due him. If interest had been allowed, the amount would have ex-

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ceeded the finding for the plaintiff on the note and the costs would have been cast on him instead of on the defendants. The question is: was J. D. Love entitled to interest? There is no statute regulating this matter; but there is a settled rule of the common law that regulates it insofar as judgment was delayed by the plaintiff. For that period the prevailing defendant was certainly entitled to interest, as the verdict was on an interest-bearing claim. Bull v. Ketchum, 2 Denio 188; Vredenburg v. Hallett, 1 Johnson's cases 27; People v. Gaines, 1 Johnson's Rep. 343; Lord v. Mayor, 3 Hill. 426; Henning v. Van Tyne, 19 Wend. 101; Gibson v. Cincinnati Enquirer, 2 Flipp. (U. S.) 88; Dowell v. Griswold, 5 Sawyer 23. Part of the delay in entering judgment was undoubtedly occasioned by the unjustifiable refusal of the plaintiff to remit a palpable excess of the verdict in his favor and the frivolous appeal he took before final judgment was rendered, which appeal he dismissed shortly after taking it. Plaintiff's course appears to have prevented judgment during the interval from June 4, 1902, to December 8th; for otherwise the case would probably have been disposed of, as the finding on the counterclaim really settled all the controverted issues. The delay in giving judgment while the cause stood adjourned on the court's own motion can not be charged to the plaintiff. At the June term, 1903, plaintiff procured a continuance for about a month, thus again postponing judgment. Should interest have been allowed on the verdict on the defendants' counterclaim for the period during which the case remained undisposed of on account of the continuance ordered by the circuit court on its own motion? Interest on plaintiff's note accumulated all the time, whether allowed finally or not; and the defendants' counterclaim was as much an interest-bearing demand, after it was preferred in the suit, as was the note. The justice of the matter undoubtedly requires that it bear interest during the

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entire period from the time the verdict was returned until judgment was entered on it; for defendants were in no way to blame for the delay, but were asking judgment.

There was no second trial on the counterclaim, as the verdict of the jury was never set aside. The second trial was on plaintiff's cause of action on the note. It would be obviously wrong, from a moral point of view, to deny interest during the delay of which defendants were innocent, thereby throwing the costs on them. Interest to verdict is always given on an interest bearing demand, even if a trial is delayed on the court's motion, and there is as good reason for giving interest after verdict, if the court delays judgment.

The point has received the attention of courts before, and while the decisions are not uniform, the weight of authority is to allow interest in the circumstances stated. A discussion of the question may be found in Griffith v. Railway Co., 44 Fed. Rep. 574, 584. In that case, which was in tort and furnished the plaintiff poorer ground for claiming interest than the present defendant J. D. Love possesses, a verdict was returned for $5,000 at one term, and stood over to the next term on a motion for new trial. Interest was allowed on the verdict to the date of the judgment, notwithstanding there was no statute to warrant it.

Gibson v. Enquirer, 2 Flipp., supra, has a good opinion on the point and, after citing most of the cases that deal with it, reaches a conclusion in favor of giving interest to the entry of judgment.

The subject was fully gone into by the Court of King's Bench on a case reserved expressly to consider it with a view to altering the prevailing rule. The decision was that interest should be given to the date of judgment. Robinson v. Bland, 2 Burr. 1077. The opinion, which was by Lord MANSFIELD, says the practice in the English courts had been to allow interest only "until writ brought;" namely, to the commencement

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of the action; a rule which has never prevailed in this country, we believe; for the uniform practice here is for interest to be added by the jury to the date of the verdict; or, in trials by the court, to the date of entering judgment. In Robinson v. Bland, the rule was deliberately altered because of its inherent injustice, and inconsistency with the general doctrine that damages or rights accruing on a cause of action in suit, for which a new suit will not lie, shall be redressed or satisfied by the judgment in the pending suit.

In Johnson v. Railroad, 43 N. H. 410, it was said: "No solid reason, we think, can be given for withholding the interest between the finding of the jury and the rendering of judgment, as it is quite clear, under our law and practice, interest should be allowed at all other times from the commencement of the suit at least, until judgment and satisfaction of the judgment."

In Sproat's Ex. v. Cutler, Wright's Rep. 157, interest was allowed on an award of arbitrators from its date and this was contested. The Supreme Court of Ohio approved the allowance, saying: "The law allows interest on all balances due on settlements; 29 O. L. 451. Here is a balance found due. If it were the verdict of a jury and judgment had been delayed we would allow interest if asked, although we know no practice of the kind in this State."

In Winthrop v. Curtis, 4 Maine 297, interest was computed on the sum named in the verdict and added to that sum by the court in giving judgment, although the delay was caused by the court reserving the case on a point of law.

Cases have been decided by the Supreme Court of the United States wherein the jurisdiction of that court depended on the validity of the interest added by the trial court to the jury's verdict, as without added interest the amount of the judgment was for a sum below the minimum jurisdiction of the Supreme Court. Quebec Steamship Co. v. Merchant, 133 U. S. 375; New

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York El. R. R. v. Bank, 118 U. S. 608. In those cases the point was noticed and the jurisdiction retained. Most of the decisions allowed interest on the verdict because judgment had been postponed by some motion or procedure of the unsuccessful party; but the decision by Lord MANSFIELD, and some of the other authorities cited, did not rely on such a circumstance; which, indeed, had not occurred. If the party asking interest has not himself caused delay, it seems to be just that he should have interest. Usually his adversary may pay the amount of the verdict if he pleases and thus prevent interest from running on it. Taking account of the essential equity of the matter, we think the adjudications referred to are a sufficient sanction for ruling that interest should have been added to the verdict on the counterclaim to the date of final judgment. This rule will accord exactly with the ancient practice to render judgment as of an earlier date when the delay in giving judgment was caused by the court. Mitchell v. Overman, 103 U. S. loc. cit. 64. In the present case the judgment was necessarily delayed, for it could not go on the counterclaim until the main action was tried, as there can be but one final judgment in a cause. Seay v. Sanders, 88 Mo. App. 478.

The judgment is reversed and the cause remanded with a direction to the trial court to compute the interest on the note and also on the counterclaim to June 30, 1903, and render judgment as of that date for the difference between the two amounts in favor of the party entitled to the difference. *Bland, P. J.*, and *Reyburn, J.*, concur.

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WIMP, Appellant, v. EARLY, Respondent.

St. Louis Court of Appeals, January 19, 1904.

1. **LANDLORD AND TENANT: Pleadings: Lien on Crop: Waiver.** In an action under section 4123, Revised Statutes of 1899, for the value of a crop, by the landlord, against a purchaser from the tenant with knowledge that it was grown on the leased premises and that the rent was unpaid, an answer which avers "that plaintiff gave to (the tenant) her consent for him to sell and dispose of, and collect all of the money for, all crops raised by him, and especially the timothy seed (the subject of the suit)" was broad enough to let in proof that plaintiff consented to the sale and thereby waived her lien, although the answer, in addition, pleaded that plaintiff waived her lien by taking other security upon which she relied solely for the collection of her rent.

2. **———: Lien on Crops: Waiver: Taking Other Security.** A stipulation in a mortgage, taken by a landlord on the land of his tenant to secure the payment of the rent on the land leased, that nothing in said mortgage should be construed as a waiver of the statutory lien on the crops on the leased land, did not create a mortgage on such crops, but was intended to avoid a possible inference that, in taking other security, the landlord relinquished the statutory security.

3. **———: ———: ———: Statute of Frauds.** A crop of timothy seed, whether sold before or after it was gathered, was not a part of the realty, and a parol release of the landlord's lien for rent thereon could be made, unaffected by the statute of frauds.

4. **———: ———: ———: Consideration.** The unconditional consent of the landlord to the sale of the crop, is a waiver of his lien thereon for the rent, although there is no consideration for such waiver.

5. **EVIDENCE: Landlord and Tenant: Lien on Crop: Waiver: Agency.** In an action under section 4123, Revised Statutes of 1899, by the landlord, for the value of a crop, against a purchaser from the tenant, where the question of waiver, by agent, of the landlord's lien on the crop, was in issue, it was error to exclude evidence as to the scope of the agency, and the apparent authority of the agent; the power of the agent to lease the land did not carry with it the power to waive the lien.

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6. ———: ———: ———: **Release of Lien on Other Crops.** Evidence that the landlord consented to the sale of other portions of the crop on the land was not admissible to prove a waiver of the lien on that portion concerning which suit was brought.

7. ———: ———: ———: **Value of Other Security.** Evidence showing the value of other security taken by the landlord for the payment of his rent was inadmissible to show waiver of the landlord's lien on the crop.

Appeal from Knox Circuit Court.—*Hon. E. R. McKee*, Judge.

REVERSED AND REMANDED.

C. D. Stewart for appellant.

Defendant's answer was sufficient to warrant the issues submitted to the jury by the court's instructions. White v. Nye, 64 Mo. App. 543; Fulkerson v. Lynn, 64 Mo. App. 654.

O. D. Jones for respondent.

(1) It was error to submit the case on the oral waiver of Jet Wimp. Objections to submitting this defense were urged all through the trial, overruled and exceptions. The reservation in the deed of trust certainly secures an "interest" in leased lands; if so an agent to release it must be "lawfully authorized by writing." R. S. 1899, sec. 3415, p. 854. (2) The express reservation of the statutory lien on the entire crop in the deed of trust, duly acknowledged and recorded and of which defendant had actual notice was equivalent to a mortgage on it. Attaway v. Hoskinson, 37 Mo. App. 132-6; Wright v. Bircher, 72 Mo. 179-183; Keating v. Hannenkamp, 100 Mo. 161-7; Waite v. McCallister, 67 Mo. App. 314. (3) There was no evidence of an oral waiver of the lien. It was preserved as by a mortgage and defendant knew it. The rent was not then in August due; the Williford's had the right to sell the

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seed, unless they thereby endangered the payment of the rent. Haseltine v. Ausheman, 87 Mo. 410-13. (4) The lien was saved as by a mortgage; there is no element of estoppel in the case. When there is no element of estoppel, the waiver must have been made between the landlord and tenant. Between them there can be no waiver or release of the lien except by competent contract; that must be an express one and supported by a consideration, to be enforcible. Evans v. Shumaker, 57 Mo. App. 454-7; Barnes v. Glover, 68 Mo. App. 569-71. (5) The answer does not aver that plaintiff ever agreed, intended or consented to waive her lien on the seed sold, by an oral agreement. Mech. Assn. v. Texas Co., 73 Mo. App. 161-5. There is no estoppel in the case even pleaded. Mathews et al. v. Nation, 69 Mo. App. 327-31; Guffith v. Gillum, 31 Mo. App. 83; Dawson v. Coffey, 48 Mo. App. 109.

GOODE, J.—Plaintiff leased to J. D. and B. Williford (father and son) 800 acres of land in Scotland county during the year 1899, for which those tenants were to pay $403 rent. They gave two notes for the rent, and secured them by a deed of trust on 80 acres of land they owned in Adair county. That deed contained a recital that it should not affect plaintiff's statutory lien on the crops grown on the leased premises. Jet Wimp, plaintiff's son, made the lease contract with the Willifords and took the notes with the deed of trust that secured them, acting in those transactions as the business agent of the plaintiff, who resided in Illinois and was in that State at the time. The defendant Early, knowing that the rent was unpaid, purchased from the tenants some timothy seed they had raised on the premises, and this action was instituted to recover the value of said seed under the section of the statutes which gives a landlord a right of action against a party who purchases any part of a crop known by him to have been grown on demised premises. R. S. 1899, sec. 4123.

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The principal defense was that Jet Wimp consented to the sale of the seed and waived plaintiff's lien. As to whether he did or not, there was contradictory evidence of a competent character; but much testimony was admitted, as bearing on the issue, which was irrelevant and prejudicial.

Before designating this incompetent testimony, we will notice other points made by the plaintiff against the judgment. One of them is that the answer tenders no issue as to a waiver of plaintiff's lien on the seed, by her consenting, through her agent, to the sale; but only avers a waiver of the lien on all the crops by the acceptance of the aforesaid deed of trust executed to secure the rent notes, and that the defense of waiver on that ground was overthrown by the recital of the deed that it should not work a waiver. This construction of the answer is unsound; for besides pleading the deed of trust and alleging that it waived the statutory lien, the answer also evers "that plaintiff gave to said J. D. Williford her consent for him to sell and dispose of and collect all of the money for all the crops raised by himself and son B. Williford, for the year 1899, on her said farm; and especially the timothy seed referred to in plaintiff's petition." It is true the answer states that plaintiff relied solely on the deed of trust and the personal obligation of the Willifords for the collection of her rent; but the above allegation was broad enough to let in proof that plaintiff, in some other way, consented to the sale of the timothy seed and waived her lien thereon. This allegation of the answer is traversed by the replication; which, besides pleading in confession and avoidance of the alleged waiver based on the acceptance of the deed of trust, contains a general denial of the other allegations of the answer.

Plaintiff argues that Jet Wimp could not waive the plaintiff's statutory lien on the crops without express authority in writing. This argument is founded on the

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conception that the proviso in the deed of trust given by the Willifords on their land in Adair county, that it should not discharge the plaintiff's statutory lien on the crops raised on her premises in Scotland county, operated to create a mortgage in her favor on the crops grown on the demised premises; that those crops were part of the realty and the supposed mortgage was, therefore, a mortgage on real property which could only be released or discharged by a writing and by an agent authorized in writing. The transaction is asserted by the defendant to have fallen, in some way, within the statute of frauds; but the suggestions on the point are vague and the reasoning is, we think, fallacious. The deed of trust, instead of attempting to create a mortgage-lien on the crops in favor of the plaintiff, sought to preserve unimpaired her statutory lien: that is, to avoid a possible inference that in taking other security she intended to relinquish the statutory security she already enjoyed; and the crop of timothy seed, whether sold before or after it was gathered (as to which the evidence shows nothing) was not part of the realty so that the lien on it could not be released except by a writing and by an agent having written authority; as contemplated by the statute of frauds for the sale of lands or interests therein. Swafford v. Spratt, 93 Mo. App. 631. A landlord may assent orally or by conduct to his tenant selling the crops grown on the leasehold, under circumstances that will release his lien on the crops. 1 Jones, Liens, sec. 579; Fulkerson v. Lynn, 64 Mo. App. 649.

The point is made against the validity of the alleged waiver of plaintiff's lien on the seed, that it was unsupported by a consideration. Here the plaintiff's counsel puts his finger on one of the inconsistencies of the law. Consent for the tenants to sell the seed and renunciation of plaintiff's lien, constituted an agreement; an agreement, however, that did not rise to the dignity of a contract, as there was no consideration for

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it. But by regarding the agreement as a waiver instead of a contract, that is to say, by giving it another legal name, it becomes valid; for a waiver of this kind need not be supported by a consideration to be effectual. This has been declared to be the law even if elements of estoppel are absent (Fulkerson v. Lynn, supra); and therein lies the inconsistency. For if the rule is put on the ground of estoppel, and not extended to cases disclosing no estoppel, it would not clash with the doctrine that contracts must have a consideration. Some juridical writers have questioned the wisdom of making a consideration indispensable in all cases to render an agreement effectual as a contract, and it is not indispensable in continental jurisprudence. The inconvenience of the requirement has led to the doctrine that slight benefit to one party, or detriment to the other, satisfies the law in this regard. But as it is settled in Anglo-Saxon law, that a consideration is necessary, certain kinds of agreements which it is desirable to enforce, but which can not be enforced as contracts for lack of consideration, are enforced under the name of waiver. Consent by a landlord to the sale by a tenant of growing crops is one of them. An effectual release of the lien in such instances may be made without a consideration and the law will recognize and uphold it, according to precedents in this State. Fulkerson v. Lynn, supra. We are bound to determine this case according to the precedents, though they may deflect legal principles from strictly logical lines, and, therefore, rule that if Jet Wimp, as the agent of plaintiff with authority to waive her lien, or with apparent authority to do so, consented unconditionally to the sale of the seed in question to the defendant and to the discharge of her lien, the defendant can not be held for the value of the seed, although there was no consideration for such waiver.

On an examination of the defendant's exceptions to the rulings on objections to the evidence, we find

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that same of the exceptions were well taken. Whether the scope of Jet Wimp's agency was sufficient to clothe him with real or apparent authority to waive plaintiff's lien on the seed, is of the essence of the validity of the alleged waiver. Yet the court refused to permit an investigation of the scope of his agency and took it for granted that, because he rented the land to the Willifords he had the authority, or an appearance of it which justified the Willifords in acting on what he said. Mere power as agent to lease land certainly does not of itself necessarily carry power to waive the principal's lien for rent. General power to deal with a tenant in regard to the payment of rent does. For aught that appears there may have been a restriction against Jet Wimp's releasing the lien, and the restriction may have been known to the Willifords or to Early. On the other hand, if he was without authority to waive, the scope of his agency and the business he was permitted to transact, may have been of a character to warrant persons who dealt with him to assume he had authority. This was a matter for investigation and testimony. The court erred in refusing to permit the plaintiff's counsel to cross-examine Jet Wimp in reference to the authority his mother had given him; though if his conduct fell within the apparent scope of his agency, those who dealt with him in ignorance of his actual authority will be protected. But it was legitimate to inquire about his powers.

The vital issue was whether plaintiff, through her agent, consented to the sale of the timothy seed to the defendant, and waived plaintiff's lien thereon, as the testimony for the defendant tends to prove; or whether Jet Wimp agreed to the sale on the understanding that Early would see that plaintiff was made safe as to her rent, as he swore. A mass of evidence was received over the objection of the plaintiff, going to prove a waiver of the lien on other crops raised by the tenants; as that they fed the corn crop to cattle with the knowl-

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edge and consent of Jet Wimp, and sold hay grown on the premises with said Wimp's knowledge and consent. These incidents had no tendency to maintain the defendant's position that the tenants were authorized to sell the seed. It was proper to receive any testimony tending to show consent to the sale of the entire crop, for that would include the seed. But proof of consent to the sale of other portions of the crop would not tend to do that except by an unwarranted inference; for, perchance, consent was given in those instances and not given in this one, or generally. As juries are often prone to determine causes on their notion of what is fair, in view of all the facts before them, without strict regard for the legal rights of parties, it is important to keep extraneous matters out of the evidence as far as possible.

There was considerable testimony admitted over the defendant's objection, as to the value of the land on which the Willifords executed the deed of trust to secure the rent. The tendency of this evidence was to create the impression that plaintiff, when she bid in that land under the deed of trust, got a bargain and really profited by the purchase over and above the amount due to her for rent. But whatever the value of said land may have been (and its value above a prior mortgage on it seems to have been trifling) the Willifords were only entitled to a credit on their notes for the amount the land brought at the sale under the deed of trust. Plaintiff was entitled to collect the balance due on her rent notes after allowing that credit; and, inasmuch as she did not waive her statutory lien by the deed of trust, to collect it by enforcing said lien on the crops, except in so far as she had waived it by the words or conduct of her agent. The evidence relating to the value of the land covered by the deed of trust was irrelevant and probably of harmful influence.

The judgment is reversed and the cause remanded.

Bland, P. J., and *Reyburn, J.*, concur.

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WHITESIDE, Respondent, v. LONGACRE, Defendant; TALL, Garnishee, Appellant.

St. Louis Court of Appeals, January 19, 1904.

APPELLATE PRACTICE: New Trial: Ambiguous Testimony. A new trial will not be ordered on the ground that the jury disregarded the testimony, regarding a certain issue, where such testimony was not free from ambiguity.

Appeal from Clark Circuit Court.—*Hon. E. R. McKee,* Judge.

AFFIRMED.

Berkheimer & Dawson for appellant.

T. L. Montgomery, and *Whiteside & Yant* for respondent.

GOODE, J.—The facts of this cause will be found in the report of the decision given on a former appeal. 88 Mo. App. 168. By that decision the first judgment in favor of Whiteside, the garnishing creditor, was reversed and the cause remanded for retrial because of the refusal of an instruction setting forth the proposition that the plaintiff could not recover if the defendant Longacre, the garnishee Tall and Mrs. Lewellyn, had agreed before Tall was served as garnishee, that the latter should pay a note on Longacre held by Mrs. Lewellyn out of the money collected on the collateral notes deposited by Longacre with Tall. At the second trial several instructions presenting that defense in different phases were given, but the plaintiff again prevailed. It is contended on this appeal that the jury dis-

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regarded the testimony, which is said to have been consistent and positive to the effect that an arrangement was made by said parties prior to the garnishment for the payment by Tall of Mrs. Lewellyn's note. There was testimony on that issue for the jury's consideration; but it was not so free from ambiguity as to render it proper for us to interfere with the verdict.

The judgment is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

STATE ex rel. McKINNEY et al., Defendants in Error, v. PULLIAM et al., Plaintiffs in Error.

St. Louis Court of Appeals, January 19, 1904.

APPELLATE PRACTICE: Bill of Exceptions. Exceptions to the trial court's rulings on motions for new trial and in arrest, duly preserved in a bill of exceptions, are prerequisites to the review of such rulings by the appellate court.

Appeal from Ripley Circuit Court.—*Hon. J. L. Fort*, Judge.

AFFIRMED.

Jno. M. Atkinson for defendants in error.

Thomas F. Lane for plaintiffs in error.

GOODE, J.—This cause was brought here by a writ of error to the circuit court of Ripley. A dramshop license was granted by the county court of said county to C. E. Smith. Thereupon the relators sued out a writ of certiorari in the circuit court directing the defendants, who are the judges of the county court, to send up

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the record of the proceedings relating to the license. The defendants made return to the writ of certiorari by filing in the circuit court a complete transcript of the proceedings in the county court. The relators subsequently moved the circuit court to quash the return, assigning in support of the motion lack of authority in the county court to grant the license at a special term, as was done; further, that the petition for license was inadequate in failing to specifically describe the place where the dramshop was to be kept and that it designated the town of Naylor as the place, instead of Thomas township, which was designated in the license. This motion was sustained and the proceedings in the county court and the license itself quashed. Motions for new trial and in arrest were filed, but no bill of exceptions was taken. This omission precludes us from reviewing the action of the circuit court on the motion. An exception to a court's ruling on a motion and a bill to preserve the exception are prerequisites to the consideration by an appellate court of an assignment that error was committed in disposing of the motion. Monroe City Bank v. Finks, 40 Mo. App. 367; Carver v. Swan, 52 Id. 647; St. Louis v. Brooks, 107 Mo. 380; Finkelnberg, App. Prac. 67.

Judgment affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

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MATHEWS, Respondent, v. WALLACE, Appellant.

St. Louis Court of Appeals, January 19, 1904.

1. **STATUTE OF FRAUDS: Pleadings: Defense.** The statement of a cause of action upon a contract need not show affirmatively that the contract is without the statute of frauds; it is a matter of defense to show it within the statute.

2. ———: **Contract for Indefinite Time.** A parol contract of hiring, for an indefinite time, may be performed within a year, and is therefore without the statute of frauds.

3. **EVIDENCE: Hearsay.** The introduction of hearsay evidence by plaintiff to prove an issue to which no defense is offered is not prejudicial error.

4. **DAMAGES: Breach of Contract of Hiring; Seeking Other Employment.** An employee who sought to recover damages for his employer's breach of the contract of hiring, was not bound to diminish his damages by seeking work elsewhere while he was waiting in reasonable expectation of being called into service by the employer at any time.

5. ———: ———. Although, after the time his alleged employment began, the employee was paid commissions for the sale of horses to the employer, that was not inconsistent with his assertion that he was employed to train horses for the employer, when it appeared that such sales were initiated prior to the time of such employment.

Appeal from Pike Circuit Court.—*Hon. David H. Eby*, Judge.

AFFIRMED.

Geo. W. Emerson for appellant.

(1) The statement does not allege that the contract was in writing nor that the work was to be performed within one year and is within the statute of frauds and

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therefore does not show upon its face that plaintiff had a cause of action. R. S. 1899, sec. 3418. The contract must be fully performed within one year. Sharp v. Rhiel, 55 Mo. 97. This cause originating in justice court, no answer need be filed, the general issue being tendered, which is a denial of the contract sued on and this raises the question of the statute of frauds without its being pleaded. Hart v. Ford, 142 Mo. 283. (2) The court erred in refusing defendant's instructions Nos. 2, 3 and 4. By No. 2 the court would have instructed the jury that if respondent had opportunities to earn as much money during the time for which he was claiming wages from appellant as appellant was to pay him, then he could not recover. This is undoubtedly the law in this State. An employee who has been discharged or who has not been given the work contracted for can not "lie by" and refuse other employment and then compel payment as though the full services had been performed, but it is the duty of the employee to make reasonable exertion to obtain other employment and by instruction No. 4 the appellant asked the court to so declare the law to be which the court refused. Bishop on Contracts, sec. 683 (Edition of 1878); Stane v. Vimont, 7 Mo. App. 277; McLellan v. Public Schools, 15 Mo. App. 262; Koenig Kraemer v. Mo. Glass Co., 24 Mo. App. 124; Stevens v. Crane, 37 Mo. App. 487; Boland v. The Glendale Quarry Co., 127 Mo. 520. (3) It is the well-settled law of this State that a person can not receive pay for services rendered as an agent or employee from both parties to a transaction. Chapman v. Curry, 51 Mo. App. 40; Exter v. Sawyer, 146 Mo. 302.

Tapley & Fitzgerrell for respondent.

The appellant can not invoke the statute of frauds because the petition states clearly that the contract by and between these parties was made and entered into on

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the — day of September, 1902, at the rate of $40 per month, services to begin on the—day of September, the day the contract was made, and same could be terminated at the end of the month, showing clearly that the statute of frauds could not be interposed as a defense, as the contract could be performed within a year. Harrington v. Railway, 60 Mo. App. 230.

GOODE, J.—Plaintiff sued on a contract of hiring, alleging that in September, 1902, he and the defendant made an agreement by which the defendant employed him as a horse trainer at the wage of $40 a month, and, as an additional consideration, plaintiff's board; that plaintiff then notified defendant he was ready to begin work and that he remained ready to begin it from the time the contract was made until this suit was started. Certain acts of employment performed by the plaintiff under the contract are also stated, with an allegation that plaintiff fully performed all the conditions of the contract, but that the defendant wholly failed to perform. The suit originated before a justice of the peace and no answer was filed by the defendant.

It is said that plaintiff can not recover because of the insufficiency of the complaint in failing to allege that the work which the plaintiff was required to do could be performed within a year, which omission authorized the inference that the contract was within the statute of frauds. It was not incumbent on the plaintiff to show affirmatively in his complaint that the contract fell outside the statute of frauds. That it was within the statute was a matter of defense if the fact could be shown. But in truth the hiring was for no definite time and it was, therefore, without the statute; because the contract might have been performed to the satisfaction of the parties within a year. Biest v. Ver Steeg Shoe Co., 97 Mo. App. 137.

The point is made that the weight of the evidence is against the plaintiff's version of the hiring; as to

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which it suffices to say that, if we thought this was so, we would be powerless to interfere, as there is substantial evidence on both sides of the question as to what were the terms of the contract. Plaintiff swore he hired to the defendant in August, 1902, provided he could obtain a release from a contract he had previously made with J. S. Thomas. Plaintiff is a trainer of horses and was hired by the defendant to train horses. He had previously agreed with Thomas to train a horse for him. Thomas readily released him when asked to do so, and plaintiff testified that on September 4th he notified the defendant of that fact and made a binding contract with the latter to work for him on the terms above stated; that the defendant agreed to have him go to work as soon as defendant's wife could prepare a room for him to occupy; that defendant declared, from time to time, he would put him to work when that event happened but never furnished him any employment. Defendant's testimony was that the arrangement between him and the plaintiff was not to become effective as a contract of employment, unless defendant succeeded in getting rid of a man and his wife who were then in his service, and that he was unable to get rid of them because his (defendant's) wife wanted to keep said employee's wife to do housework. A square issue of fact was presented as to what the arrangement was and the finding of the jury settled the issue.

A letter from Thomas to the plaintiff was introduced in evidence to show that Thomas released the plaintiff from his employment, thereby enabling him to take service with the defendant. This letter was objected to as hearsay. Its admission ought not to work a reversal of the judgment, since the essential facts relating to this particular point were that the plaintiff was released from his prior engagement and was at liberty to work for the defendant, who was apprised that this was so, and concluded the contract with plaintiff. It was unnecessary to put the letter in evidence;

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but its admission could not have worked prejudicial error, inasmuch as there was no defense made on the ground that plaintiff was withheld from defendant's service on account of his previous contract with Thomas. If there had been such a defense it would have been necessary to overcome it with evidence and, of course, with direct evidence. But the only defense interposed was that the hiring of plaintiff was contingent on the discharge by the defendant of the man already in his service, whose place, according to defendant's contention, plaintiff was to take. Perhaps the letter was not competent; but as it bore exclusively on a fact that was undisputed, it affords no cause to reverse the judgment.

It is insisted that even if plaintiff's version of the agreement is true, he was bound to seek work elsewhere during the time he was waiting to enter defendant's service, in order to diminish the sum the defendant would have to pay on account of failing to carry out the contract. There might be merit in this point if plaintiff had been notified the defendant would not give him employment. But all the evidence goes to show plaintiff waited in expectation of being called into service by the defendant at any time. With that expectation, reasonably founded as it was, it would have been improper for him to engage to work for some one else.

After September 4, 1902, on which date plaintiff swore he was employed, he was paid commissions by two persons on sales of horses made to the defendant. These payments are cited as inconsistent with the plaintiff's assertion that he was then in the defendant's employ; since he could not legally be working for the defendant and at the same time earning money as the agent of other persons in sales of horses to the defendant. Those commissions were paid for sales which had been initiated prior to the time plaintiff was employed

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by the defendant and were compatible with fair dealing on his part under his contract of employment.

The judgment is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

CITY OF LOUISIANA, Appellant, v. SHAFFNER, Respondent.

St. Louis Court of Appeals, January 19, 1904.

MUNICIPAL CORPORATIONS: Ordinance: Advertisement for Bids. Where a city, proceeding under sections 6261 and 6262, Revised Statutes of 1899, constructed a sidewalk in front of defendant's property, and the advertisement for bids for such construction referred for specifications to an ordinance which contained no specifications or provisions for such sidewalk, the proceeding was ineffectual to place a lien on defendant's lot.

Appeal from Louisiana Court of Common Pleas.—*Hon. D. H. Eby,* Judge.

AFFIRMED.

James W. Reynolds for appellant.

(1) Defendant insists that the city should pay for the construction of her sidewalk because the city engineer in the above advertisement for bids made reference to ordinance No. 1619, which ordinance was not put in evidence. Defendant's rights or interests were not affected by the mistake if it was a mistake. Shehan v. Owen, 85 Mo. 465; Cole v. Skrainka, 105 Mo. 303; City of Marionville v. Henson, 65 Mo. App. 397. (2) The only possible injury that could be claimed by de-

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fendant would be the payment by plaintiff of too high price for the work because of its failure to obtain competive bids for the work on account of the form of the advertisement; and this defense could not be set up under the general denial of the defendant in this case. City of Carthage v. Badgley, 73 Mo. App. 123; Vieths v. Plannet Co., 64 Mo. App. 207.

Pearson & Pearson for respondent.

(1) The city engineer of the city of Louisiana, did not advertise for bids for the construction of the sidewalk in question, as he was authorized and directed to do by ordinance. Guinott v. Engelhoff, 64 Mo. App. 365-6; Cole v. Skrainka, 105 Mo. 308; West v. Porter, 89 Mo. App. 153.

GOODE, J.—Action by the city of Louisiana to recover the amount paid by it for the construction of a granitoid sidewalk in front of lot 291, block 42, in the original town site of the city of Louisiana, which lot is alleged to have been owned by the defendant. Said city works under a special charter, but this sidewalk was put down by virtue of the power conferred by sections 6261 and 6262, R. S. 1899. The construction of the walk was directed by an ordinance, No. 1626, which required the owners of certain lots, including the one named, to build sidewalks in the manner and of the material stated in the ordinance in front of their lots. Most of the sidewalks were ordered to be built of granitoid, but some were to be made of boards. The width of the granitoid walks, the mode of their construction with regard to the separate layers of cinders and gravel, and the thickness of the layers, were specified in said ordinance. It contained, too, a provision that if the owners did not begin to build the walks by a designated date and finish them in a reasonable interval, the city council should cause them to be built, and that in that

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contingency their cost should constitute a lien on the abutting property. Some of the property owners failed to put in walks within the time limited, and thereafter another ordinance, No. 1659, was passed, which directed the city engineer to advertise for bids for the construction of granitoid walks in front of the lots of the delinquent owners, of whom this defendant was one. The engineer advertised for bids for putting in the sidewalks, but the advertisement solicited bids for the construction of sidewalks of the kind and dimensions specified, not in ordinance No. 1626, which had authorized the laying of the sidewalks, but in another ordinance previously passed, to-wit, No. 1619, which had no reference to and made no mention of a walk in front of the defendant's lot. Bids were taken under this advertisement, a contract was let, and the walks laid.

We have no knowledge concerning the contents of ordinance No. 1619, as it was not put in evidence, though it is conceded, as stated, that it neither mentioned a walk in front of defendant's lot nor contained specifications for one. We do not know even that it asked for bids for granitoid walks. It may as well have called for bids for walks of wood, brick or stone. The alleged advertisement for bids, therefore, inasmuch as it called for bids for walks of the kind specified in an ordinance which contained no specifications or provision for a walk in front of the defendant's lot, and no known specifications of any kind, was, in effect, no advertisement at all. But an advertisement for bids should invite competitive bidding for an improvement of the character designated in the order for the particular improvement intended; as that is the only kind property owners can be made to pay for, and they can not be made to pay unless the work was competitively let on proper specifications. Clapton v. Taylor, 49 Mo. App. 117; City of De Soto ex rel. v. Showman, 100 Mo. App. 323, 73 S. W. 257. In consequence, the contract for the walk, and all the proceed-

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ings, were ineffectual to place a lien on defendant's lot. This case is not one on a special taxbill, in which, by statutory mandate, the bill makes a prima facie case. The plaintiff introduced all the ordinances and records on which its lien was supposed to be founded and they prove that it has no lien.

The judgment is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

Ex Parte HINKLE.

St. Louis Court of Appeals, January 19, 1904.

1. **MUNICIPAL CORPORATIONS: Dramshop License: Repeal of Ordinance.** Where an ordinance provides that no one shall conduct a dramshop in the city without paying license fee, and subsequently another ordinance is enacted which, without altering the provisions of the first, provides regulations which must be complied with, by the applicant for license in order to get it, the second ordinance does not repeal the first.

2. ———: ———: **Cities of the Fourth Class.** Cities of the fourth class are given power by section 5978, Revised Statutes of 1899, to regulate and to license dramshops, saloons and liquor sellers.

3. ———: ———: **Ordinance: License Fee.** An ordinance which declares it to be unlawful for any person to engage in certain occupations enumerated, including that of dramshop keeper, without obtaining a license, the fee for which in the case of dramshops is fixed at $1,000 a year or $500 for six months, is not void for uncertainty.

4. ———: ———: **Oppressive Ordinance.** One thousand dollars a year for saloon license in a city of the fourth class is not so unreasonable a charge that a court would be justified in declaring the ordinance fixing it void because unjust and oppressive.

Habeas Corpus.

PETITIONER REMANDED.

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F. M. Mansfield for petitioner.

(1) It is now a well-settled rule in this State that where a city ordinance is based upon a general grant of power in the charter, and not a specific grant, the reasonableness of such an ordinance can be inquired into by the courts, and if unreasonable, the ordinance will be declared void. City of Springfield v. Starke, 93 Mo. App. 76, and cases cited. (2) The rule in this State is well settled that although a license granted by a municipal corporation is a mere privilege, it is yet so far within the protection of the law—to that extent equivalent to a contract right—that it can not be abrogated without sufficient and just cause. State v. Baker, 32 Mo. App. 98; Hannibal v. Gaut, 18 Mo. 515; Independence v. Noland, 21 Mo. 394; State v. Hawthorne, 9 Mo. 389; State v. Matthews, 50 Mo. 129; State v. Matthews, 66 Mo. 328; State v. Marrow, 26 Mo. 131; State v. Andrews, 26 Mo. 172; State v. Andrews, 28 Mo. 14.

GOODE, J.—The petitioner Hinkle procured a writ of habeas corpus from one of the judges of this court in vacation, returnable to the October term. He was at that time in the custody of the marshal of the city of Mountain Grove, under a warrant issued by the mayor and ex-officio police judge of that city, for conducting a dramshop and selling intoxicating liquors in less quantities than three gallons without having a license to do so. The writ was granted by consent of the city authorities and, therefore, without an examination of the merits of the petition; and the cause will be disposed of with no inquiry into the propriety of the proceeding as a means of testing the validity of the city ordinances relating to dramshop license. The invalidity of those ordinances is the ground on which the petitioner is averred to be unlawfully restrained of his liberty. Many averments are made in the petition against the right of the city to enact them, or to exact the license fee im-

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posed on dramshop keepers, which will be disregarded, for the reason that the parties have filed the following stipulation as embodying the essential facts on which they desire the case to be decided:

"For the purpose of a trial of this cause and in order to save cost of taking depositions, the following facts are agreed upon:

"That the petitioner on the 18th day of April, 1903, duly obtained from the county court of Wright county a license to keep a dramshop at his stand in the town of Mountain Grove, Missouri, for a period of six months from that date; that at the time of his arrest he was keeping a dramshop in the said city of Mountain Grove, under and by authority of his said county license and was selling intoxicating liquors in less quantities than three gallons without having a license as such dramshop keeper from the said city of Mountain Grove. That he had at no time been engaged in the business or avocation of keeping, maintaining or conducting a saloon other than that of his said dramshop. That on the —— day of June, 1903, the petitioner was, by virtue of a warrant issued by the respondent Rose as mayor and acting police judge of said city upon a complaint made by the said John A. Stephens, charging him with unlawfully carrying on and engaging in the business of keeping, maintaining and conducting a saloon in the said city of Mountain Grove on the 8th, 9th, 11th, 12th, 13th and 14th days of May, 1903, without first taking out and having from the said city of Mountain Grove, a license to engage in and carry on said business, contrary to section 2 of an ordinance number——, being an ordinance levying and fixing the amount to be charged as license tax on certain objects and persons, passed and approved April 13th, 1903: and with having on the second day of May, 1903, at the said city of Mountain Grove unlawfully sold intoxicating liquors in less quantities than three gallons without first taking out and having a license from the said city of Mountain Grove as a dram-

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shop keeper contrary to section 6 of an ordinance entitled 'An ordinance concerning dramshops and saloons, passed and approved April 20, 1903,' a copy of which complaint so filed against your petitioner is hereto annexed. That at the time of issuing and service of the writ of habeas corpus herein, the petitioner was in the custody of the respondent John A. Stephens, under and by virtue of the warrant issued by the respondent Rose as aforesaid; that he has not been discharged from said arrest, but that he is under arrest and in the custody of the respondent Stephens, and that the said complaint and charges were and are still pending against him.

(Signed) "F. M. MANSFIELD,
"Atty. for Petitioner.
"E. A. FARNSWORTH,
"Atty. for Respondent."

It appears from the above agreed facts that Hinkle was granted a license to keep a dramshop in Mountain Grove by the Wright county court, on April 18, 1903. He opened a dramshop under said license and was selling intoxicating liquors as a dramshop keeper without procuring a license from the city of Mountain Grove, although there was an ordinance in force, enacted on April 13, 1903, requiring such a license and fixing the fee for it at one thousand dollars a year, or five hundred dollars for six months. Another ordinance was enacted April 20, not abolishing the requirement of a license or changing the license fee, but prescribing the terms on which a license as a dramshop keeper could be obtained; namely, on the petition of the majority of the taxpaying citizens in a city block, and compliance with other conditions in all respects like the general statutes of the State on this subject. Both the ordinances are before us as exhibits attached to the pleadings. It is said in the petitioner's brief that the one of April 20 repealed the one of April 13; but it cer-

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tainly had no such effect. The two ordinances are perfectly consistent; the first provided that no one should conduct a dramshop in the city of Mountain Grove without obtaining a license and paying the license fee; the second, without altering that provision of the first one, simply provided regulations which must be complied with by an applicant for license in order to get it. What Hinkle did was to run a dramshop without procuring, or attempting to procure, a city license and in disregard of both the ordinances. Of course, he was guilty of an offense unless the ordinances are void, and they are said to be void because Mountain Grove, as a city of the fourth class, had no power to pass them. Cities of the fourth class are given power by an express statutory enactment, both to regulate and to license dramshops, saloons and liquor sellers. Sec. 5978, R. S. 1899. It is said the ordinance of April 13 was illegally passed over the mayor's veto; but no showing is made in the stipulated facts on that proposition and we must assume it was legally adopted unless it exceeds the legislative power of the city.

The ordinance is also attacked as uncertain in its provisions and therefore void. We think, on the contrary, that it is quite precise, as it declares it to be unlawful for any person to carry on or engage in the enumerated occupations, including that of dramshop keeper, without obtaining a license, the fee for which in the case of dramshops, is fixed, as stated, at one thousand dollars a year, or five hundred dollars for six months.

The further contention is that it was unjust and oppressive, both as exacting an exorbitant fee, and as discriminating against the petitioner. One thousand dollars a year for city saloon license is not so unreasonable a charge that a court would be justified in declaring the ordinance fixing it void. License fees of that amount are often exacted by cities and the exaction upheld by the courts. Certainly the ordinance does not

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discriminate against Hinkle; for he was not mentioned, nor in any manner indicated in it, as it was a general ordinance applicable to all persons who might wish to conduct a saloon in Mountain Grove.

Judging from the petitioner's brief, his counsel must have overlooked the clause of section 5978, R. S. 1899, which allows the mayor and board of aldermen of cities of the fourth class to license and regulate dram-shops, saloons and liquor sellers; for the brief points out several clauses of that section as being the only ones which pretended to confer any authority to enact such an ordinance, but omit the clause which expressly confers it. The brief refers to the power given to prohibit the selling of liquors to minors and drunkards; to the clause providing that a license tax shall be regulated by ordinance and no license issued until the amount to be paid for it is paid to the city clerk, and other provisions regulating the issuance of licenses. Those grants of power are argued to be inadequate as authority for the ordinances in question, and likely they are inadequate. But the power to pass the ordinances is not derived from them, but from the other clause directly conferring authority broad enough to support the municipal legislation for violations of which Hinkle is in custody.

It is argued that the statutes dealing with cities of the fourth class do not leave it discretionary with the mayor and aldermen to grant or refuse saloon licenses, which is asserted to be a matter of local option and subject to the will of the voters expressed according to the local option statutes. Granting this argument to be sound, the question comes down to this: Do the ordinances in question prohibit the sale of intoxicating liquors in Mountain Grove or regulate it? They undoubtedly regulate it unless the fee exacted is so onerous as to entirely prohibit the business. We hold the fee was fixed at an amount within the discretion of the

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city officials in executing, by legislation, their statutory power to regulate dramshops and liquor selling.

The petitioner is remanded to the custody of the marshal of the city of Mountain Grove. *Bland, P. J.*, and *Reyburn, J.*, concur.

JORDAN et al. Appellants, v. VAUGHN, Respondent.

St. Louis Court of Appeals, January 19, 1904.

1. **LOST INSTRUMENT: Affidavit Showing Loss and Contents.** An affidavit showing the loss and the contents of a lost instrument, filed in the case, is a sufficient compliance with section 4560, Revised Statutes of 1899.

2. ———: **Cost Bond: Supplying Lost Instrument.** A lost cost bond is not one of the instruments to be supplied under the provisions of section 4561, Revised Statutes of 1899; it may be supplied by affidavit of its loss and contents, under the general powers of the court.

3. ———: ———: **Motion for Judgment.** A motion for judgment against sureties on a cost bond which has been lost, is not an action on a lost instrument within the meaning of sections 642 and 643, Revised Statutes of 1899.

Appeal from Monroe Circuit Court.—*Hon. D. H. Eby*, Judge.

AFFIRMED.

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W. T. Ragland and *R. B. Bristow* for appellant.

J. M. Crutcher and *J. H. Whitecotton* for respondent.

(1) Appellants, as it appears from their brief, contend for the reversal of this judgment on the sole ground that sections 4560 and 4561, R. S. 1899, do not authorize the supplying of any lost record without notice to the party or parties affected. Section 4560 of said Revised Statutes of 1899 provides how mutilated, lost or destroyed records or papers may be supplied. Section 4561 of said Revised Statutes of 1899 provides what proceedings shall be had when certain records have been supplied as provided by section 4560, supra, and provides specially as to what proceedings shall be had on judgments and executions supplied, by requiring a summons to issue. Said section further provides the procedure to reinstate "any inventory, sale, bill, or order of any county or probate court" by a notice being served upon the administrator or executor, etc., as shown by said section. This procedure by notice is only required and is limited to said papers or orders affecting estates. Now these provisions aforesaid leave all the other instruments or papers provided for under sec. 4560, R. S. 1899, without any direct statutory provision further than provided for in said section, unless the doctrine of *ejusdem generis* can be made to apply to said sections 4560 and 4561, as contended for by appellants. We know of no holding of any court in this State that would authorize such a contention. The doctrine of the rule of *ejusdem generis* only applies where the particular words are of the same nature or kind, and an interpretation should never be adopted that will defeat the purpose of the statute if any other construction is admissible. State ex rel. v. Corkins, 123 Mo. 56; State v. Phelan, 66 Mo. App. 548; St. Joseph v. Elliott, 47 Mo. App. 418. (2) The respondent contends that

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outside and beyond the provisions of said sections 4560 and 4561, supra, the defendant—respondent herein—having filed his motion under and by virtue of the provisions of section 1562, R. S. 1899, had the right to prove the contents of the lost bond by secondary evidence, which was done in this case. State v. Simpson, 67 Mo. 647; Railway v. Holladay, 131 Mo. 450.

GOODE, J.—Yowell had an action in the circuit court of Monroe county against the defendant Vaughn. The other parties, Thompson and Jordan, who are the appellants here, were the sureties of Yowell on a cost bond. After one trial of the action and a reversal of the judgment by this court, it was dismissed for failure to prosecute it and afterwards, the court, on motion of the defendant, entered judgment against Yowell and his two sureties for the costs. The sureties took this appeal.

The cost bond was lost before judgment was rendered on it; but its contents were proven and were, substantially, that the parties to it bound themselves to pay all the costs that had or might accrue in the cause. An affidavit to show its loss and its contents, was duly filed in the circuit court prior to the judgment. That it was lost and what it contained were proven, too, by one of the attorneys for the sureties; and there is no dispute about those facts.

Several objections were raised by the sureties to judgment being rendered against them for the costs; but only one point is discussed in their brief on this appeal; namely, that it devolved on the defendant Vaughn to proceed under sections 4560 and 4561 of the Revised Statutes, to supply the bond.

Section 4560 was, as stated, complied with when the affidavit, containing a statement in writing of the full contents of the lost instrument, was filed. Section 4561 enumerates the instruments to which its provisions are intended to apply and a bond for costs is not one of

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them. That section relates to judgments, inventories, sale-bills, or other orders of a county or a probate court. It provides two distinct procedures; one to supply lost judgments or executions, the other to supply a lost inventory, sale-bill or order of a county or a probate court. The court committed no error in supplying the bond on the proof made, as such a procedure fell within its general powers. State v. Simpson, 67 Mo. 647; Railroad v. Holladay, 131 Mo. 440.

This is not an action on a lost instrument within the meaning of sections 642 and 643, and it is conceded that plaintiff did not have to proceed according to those sections.

The judgment for costs was properly rendered against the sureties on the bond (Schawacker v. McLaughlin, 139 Mo. 323), and is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

SECRIST, Respondent, v. EUBANK, Defendant; EUBANK, Interpleader, Appellant.

St. Louis Court of Appeals, January 19, 1904.

1. **APPELLATE PRACTICE: Motion for New Trial: Reason for Sustaining Motion.** Where the order of the trial court sustaining a motion for new trial contains no statement of the grounds for it, as provided by section 801, Revised Statutes of 1899, the appellate court can not overrule such decision unless every assignment in the motion was without merit.

2. ———: ———: **Weight of Evidence.** Where a motion for new trial was sustained, with no reason stated for the ruling, and one assignment in the motion was that the verdict was against the weight of evidence, and where there was substantial evidence against the verdict, the ruling will be approved by the appellate court.

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Appeal from Shelby Circuit Court.—*Hon. N. M. Shelton,* Judge.

AFFIRMED.

Enoch M. O'Bryen for appellant.

J. D. Dale and *G. W. Humphrey* for respondent.

GOODE, J.—The interpleader, Mrs. Fannie Eubank, appealed from an order of the circuit court setting aside a verdict in her favor and granting a new trial. The litigation is over a mare attached at the suit of the plaintiff as the property of the defendant Nelson Eubank, whose wife the interpleader is. She filed her verified petition or claim for the mare after the levy of the attachment, and a trial of her right to the property ensued in which she prevailed. A motion for new trial was made by the plaintiff and sustained. It assigned six reasons why a new trial should be granted, among which was one that the verdict was against the evidence. It appears to be taken for granted by appellant's counsel that the new trial was granted because no proof was made that the mare had been seized under the attachment writ, or withheld from appellant's possession, and his argument aims to convince us that the court erred in so holding. We would scarcely lay much stress on the omission to introduce the constable's return of the writ, showing a levy on the mare; for the case was tried by both sides on the assumption that the animal had been levied on and taken; and, besides, there was some testimony tending to prove the fact. The difficulty with the interpleader's appeal is that the order sustaining the motion for new trial contains no statement of the reason or ground on which the circuit court sustained it, as the statutes provided it should. R. S. 1899, sec. 801. We are, therefore, powerless to overrule that court's decision unless every assignment in the

motion was without merit. But as to the verdict being contrary to the evidence or the weight of the evidence, it was the peculiar function of the trial court to decide, and we must defer to its opinion, if there was any substantial evidence against the interpleader's claim. State ex rel. v. Todd, 92 Mo. App. 1. There was such evidence; principally in the form of statements made by her husband, tending to prove he owned the mare. Likely the testimony as to those statements was incompetent against the interpleader, if its admission had been opposed; but it was not, and having been admitted, was entitled to consideration. The court below had a discretion to order a new trial on the ground that the verdict was against the weight of the evidence, and as that ground was assigned in the motion, we must approve the ruling and remand the cause to be retried. *Bland, P. J.*, and *Reyburn, J.*, concur.

RALLS COUNTY, Plaintiff, v. STEPHENS, Interpleader, Respondent; CARTER et al., Interpleaders, Appellants.

St. Louis Court of Appeals, January 19, 1904.

1. **REWARD: Apprehension of Criminal.** In a contest over a reward offered for the apprehension and conviction of a murderer, as between one who furnishes information pointing to the guilty party, and one who takes prompt and energetic measures and spends time and money to procure the arrest, and elicits a confession from the murderer, the latter is entitled to the reward.

2. ———: ———. And an officer who, without knowing that a reward is offered, actually makes the arrest, at the instance of one who spends time and money and takes prompt and energetic measures to apprehend the criminal, is not entitled to the reward as against the latter.

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Appeal from Ralls Circuit Court.—*Hon. D. H. Eby*, Judge.

AFFIRMED.

John W. Bingham and *Roy & Hays* for appellant.

(1) This statute gives no authority to offer reward for conviction. The State of Missouri has never hungered for the blood even of murderers to such an extent as to offer a reward for their conviction. Thornton v. Railroad, 42 Mo. App. 68. (2) Carter did not make the arrest of Johnson as the agent of Stephens. The murder was committed in Ralls county. The arrest was made in the city of Milan, in Sullivan county, of which city Carter was at the time marshal. Stephens was a deputy sheriff of Monroe county. Both the murder and the arrest were beyond his jurisdiction, he having no jurisdiction beyond his county, except in a few special statutory cases of which this is not one. Murfree on Sheriffs, sec. 114. So that as to this arrest Stevens was a private citizen. But Carter was marshal of Milan, as such he was a conservator of the peace. See Revised Statutes, secs. 5697, 5789, 5922. Bishop's Criminal Procedure, vol. 1, sec. 181; Lovejoy v. Railroad, 53 Mo. App. 386; Juniata v. McDonald (Pa.), 15 Atl. Rep. 696; Everman v. Hyman (Ind.), 38 N. W. 1022; Reif v. Parge, 55 Wis. 496, 13 N. W. 493; Wentworth v. Day, 3 Metc. 352; Drummond v. U. S., 35 Ct. Cl. 356; Am. & Eng. Ency. of Law, vol. 21, p. 398; Sanderson v. Lane, 43 Mo. App. 158.

J. O. Allison and *W. T. Ragland* for respondent.

(1) The maxim, "*qui facit per alium, facit per se,*" is peculiarly applicable in this case. The rule is well established that one may perform the services for which a reward is offered by agent or servant or the instru-

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mentality of another. Am. and Eng. Ency. of Law (1 Ed.), vol. 21, p. 402; par. 9; Montgomery Co. v. Robinson, 85 Ill. 174; Pruitt v. Miller, 3 Ind. 16; Russell v. Stewart, 44 Vt. 170. (2) Interpleader Testerman is not entitled to the reward because he did not perform any of the services for which the reward was offered. Giving information that leads to the arrest of a criminal does not entitle one to a reward offered for his apprehension and arrest, for they are quite distinct things though one may have been in consequence of the other. Shuey v. U. S., 92 U. S. 73; Everman v. Hyman, 3 Ind. App. 459; Juniata Co. v. McDonald, 122 Pa. St. 115; Adair v. Cooper, 25 Tex. 548; Am. and Eng. Ency. Law (1 Ed.), vol. 21, p. 396. In any event Testerman is concluded by the judgment of the trial court, he not having appealed therefrom. (3) Appellant is not entitled to the reward: First. Because as already stated he was merely acting as the agent or servant of Stephens when he made the arrest. Second. Because he did not do anything to assist in bringing about the conviction of Johnson. He does not even assert that he did in his interplea, and for that reason his pleading does not state facts sufficient to constitute a cause of action and would not support a judgment in his favor. Third. At the time Carter arrested Johnson he did not know that a reward had been offered. This knowledge was essential to consummate a contract between him and Ralls county. Howland v. Lounds, 51 N. Y. 604; 10 Am. Rep. 654; Fitch v. Suedaker, 38 N. Y. 248; 97 Am. Dec. 791; Railroad v. Sebring, 16 Ill. App. 181; Ensminger v. Horn, 70 Ill. App. 605; Sanderson v. Lane, 43 Mo. App. 158.

GOODE, J.—These parties are in litigation over an award offered by Ralls county for the murderer of one of its citizens, Marcus D. McRae, who was slain and robbed on April 28, 1902. The cause was tried on an agreed statement of the facts; but as the recitals of that

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statement are more elaborate than we care to copy in full, we will extract from it the important facts on which we rest our decision.

Stephens was deputy sheriff of Monroe county at the time stated, and resided in Monroe City, a short distance from the scene of the murder, which was in the northwest corner of Ralls county. On May 1st, three days after the murder, William Testerman, who resided at Withers Mill, notified Stephens that a negro had gotten on a west-bound freight train at Withers Mill the morning following the day McRae was killed. This information aroused a suspicion in the mind of Stephens that the negro referred to by Testerman was Jesse Johnson, whom he (Stephens) knew. He interviewed the conductor of the freight train on which the negro had travelled, and from the description given by the conductor, became convinced that Johnson was the man. He also learned from the conductor that Johnson left the train at Brookfield. Stephens knew of the reward that had been offered by Ralls county, and in order to apprehend Johnson, telephoned to the marshal at Brookfield a description of him, asked if such a man had been at Brookfield and received a reply that he had been there, but had left for Milan in Sullivan county. Thereupon Stephens telegraphed the marshal of Milan to arrest Johnson, giving a description of him. The appellant George T. Carter was the marshal of Milan and in obedience to Stephens' telegram he made the arrest, notifying Stephens that he had done so by a telegram, the charge for which the latter paid. Carter also received a fee of one dollar for the arrest. When he made it he did not know what Johnson was wanted for, nor that a reward had been offered for the murderer of McRae. While Stephens was on the train on his way to Brookfield, he received Carter's message that Johnson had been taken. Carter turned Johnson over to Denbro, a secret service man in the employ of the Hannibal & St. Joseph Railway, who was in Milan on the day

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of the capture, to be taken to Brookfield and delivered to Stephens, as was done. Stephens in due time, surrendered him to the sheriff of Ralls county; but while Johnson was still in his custody, Stephens elicited from him a confession of the murder of McRae which was instrumental in securing his conviction. The reward offered by the county court was "for the apprehension, arrest and conviction" of the person guilty of McRae's murder. Testerman, Carter and Stephens all claimed the reward; but Testerman did not appeal from the decision of the court below, which was in Stephens' favor. Carter appealed and contends that on the agreed facts he was entitled to the reward, inasmuch as he made the arrest.

Who earned the reward? is the question; and on reading the above recital of the material facts of the controversy, one perceives that the meritorious claim is that of the respondent, Stephens. He alone of the parties, when he learned of the murder and the reward for its perpetrator, became active and enterprising in endeavoring to effect a capture. He took prompt and energetic measures, spent time and money, made a journey, sent telegrams and did what he could to bring the criminal within the grasp of the law. Testerman, it is true, furnished a little news, which started the activity of Stephens; but Testerman's claim had no force, because he did not comply with the conditions of the offer of the reward. Shuey v. U. S., 92 U. S. 73; Everman v. Hyman, 3 Ind. App. 459; Juniata Co. v. McDonald, 122 Pa. St. 115; Adair v. Cooper, 25 Tex. 548; 21 Am. and Eng. Ency. Law (1 Ed.), p. 396, note 1. He neither pursued the offender, nor followed up his clue sufficiently to satisfy himself that he suspected the right man. Besides, his claim is not before us, as he submitted to the judgment against him.

Carter was the first to lay hands on Johnson after the commission of the crime; but he did so as the agent, or, one may say, the arm of Stephens. He acted en-

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tirely for Stephens and by the latter's direction, without knowing what crime Johnson was wanted for, or that a reward had been offered for his apprehension. It is true, as argued by appellant's counsel, that it would have been appellant's duty as town marshal and an officer of the State, to make the arrest if he had known, or had good reason to suspect that Johnson was guilty of the crime. R. S. 1899, sec. 2468. But he neither knew the crime of which Johnson was guilty had been committed, nor had the slightest reason, except the intimation of Stephens' message, to believe Johnson guilty of any crime. A peace officer has no right to arrest a citizen on mere whim or caprice, or without good ground for suspecting he has committed a felony. If he acts without a warrant, it must be upon reasonable suspicion. State v. Grant, 76 Mo. 236; Id., 79 Mo. 113. It follows that there is no merit in the argument that, because Carter was city marshal of Milan, it was his duty to arrest Johnson and that he is, therefore, entitled to the reward, as having made the arrest as marshal instead of as Stephens' agent. It is plain he acted as Stephens' agent and in obedience to the latter's direction. In sending a message at Stephens' cost announcing the arrest, Carter showed that he understood he had no duty to perform except to act on Stephens' suggestion, keep the latter advised and observe his orders. Then, too, he did not retain his captive, but forthwith surrendered him to Denbro for Stephens, with the understanding that Denbro would convey him to Brookfield, and turn him over to Stephens; which was tantamount to recognizing Johnson to be Stephens' prisoner. The hue and cry for McRae's murderer rendered it proper for Stephens to pursue him. R. S. 1899, sec. 2466. Having learned who the murderer probably was and where he was, it became Stephens' duty to have him seized at once in the surest way possible, before he absconded. To perform this duty Stephens promptly telegraphed to the marshal of

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Milan, where he knew Johnson to be, to take him into custody. This was as much an arrest by Stephens, so far as entitling him to the reward is concerned, as if he had personally laid hands on Johnson and actually captured him; for an arrest may be made in such circumstances by an agent. 21 Am. and Eng. Ency. Law (1 Ed.), 402; Montgomery Co. v. Robinson, 85 Ill. 174; Pruitt v. Miller, 3 Ind. 16; Russell v. Stewart, 44 Vt. 170. When Carter made the arrest he did so in obedience to Stephens' order and with no knowledge whatever of the cause for it; so we think the arrest, while technically by Carter, was, for the purpose of earning the reward, by Stephens, who was the immediate cause of it. Crashaw v. City of Roxbury, 7 Gray 374; Jenkins v. Kelren, 12 Gray 330; Besse v. Dyer, 9 Allen 151; Stevens v. Brooks, 2 Bush. (Ky.) 137; Brennan v. Haff, 1 Hilton (N. Y. C. P.) 151. To order this money paid to Carter would be to ignore all the effective work that was done to accomplish the capture of Johnson and give weight to nothing but the incident of Carter's putting his hand out and taking him; taking him blindly at the suggestion of one who had developed the evidence pointing to his guilt, discovered his whereabouts and knew the truth. That person in the real sense of the word, "apprehended" the criminal and deserved to be rewarded.

No point is made in respect to the doctrine of the law which denies rewards to officers on grounds of public policy, and we have not considered the case in that light.

The judgment of the court below was for the right party and is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

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SHY, Plaintiff and Appellant, v. SHY, Defendant and Appellant.

St. Louis Court of Appeals, January 19, 1904.

DIVORCE: Alimony Pendente Lite. In an action for divorce by the wife on the statutory ground of "indignities," the husband filed answer denying the allegations, and a cross-bill, in turn praying to be divorced on the ground of indignities, the evidence is examined and the husband held to be the innocent and injured party and divorce granted him as prayed in the cross-bill, but alimony *pendente lite* for attorney fees and suit money allowed the wife.

Appeal from Pike Circuit Court.—*Hon. D. H. Eby*, Judge.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

Pearson & Pearson for plaintiff-appellant.

Ball & Sparrow for defendant-appellant.

"The wife is bound to follow the fortunes of her husband and live where he chooses to live and in the style and manner which he may adopt." Koster v. Koster, 43 Mo. App. 115; Messinger v. Messinger, 56 Mo. 329; Schurman v. Schurman, 93 Mo. App. 99. The husband is entitled to a divorce on the grounds of desertion, when his wife leaves him because he can not, or because he refuses to support her in the style she demands and especially so when by her words and acts she has no intention to return to him. Freeman v. Freeman, 94 Mo. App. 504. The frequent and unjust charge by the plaintiff of infidelity upon the part of the husband, is such an indignity as would warrant a decree of divorce on his crossbill. Clinton v. Clinton, 60 Mo.

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App. 296. The acts, conduct and charges of plaintiff constitute indignities that justify decree of divorce for defendant. Griesedirck v. Griesedirck, 56 Mo. App. 94; Owen v. Owen, 48 Mo. App. 208; Lynch v. Lynch, 87 Mo. App. 32.

REYBURN, J.—Plaintiff sued defendant for divorce, and defendant in turn by crossbill asked like relief, each charging against the other in statutory language the perpetration of intolerable indignities, specifically detailed and which will appear in the course of the consideration of the case: upon full hearing, the circuit court refused a divorce to either party, and both husband and wife have appealed; the court further made an order of allowance to the latter of twenty-five dollars per month as temporary alimony pending appeal, fifty dollars for attorneys' fees and fifty dollars for suit money, and defendant excepted to this ruling and also appealed therefrom. After an acquaintance of several years, the parties hereto were married on the fourteenth day of November, 1900, and on the fourth day of May, 1901, the wife left her husband and remained apart from him until the eighth day of October, 1901, when she resumed marital relations with him, but again on the 20th day of July, 1902, plaintiff left finally, and on the 21st day of November, 1902, brought this action. Both parties were natives of Pike county where the suit was brought; plaintiff, a daughter of a tailor, had been educated in the public schools of Louisiana, and at time of the beginning of the acquaintance with her future husband was commendably earning her own livelihood in a millinery store in that city; defendant had always resided on a farm, and to within a year or two of his marriage had farmed in partnership with a married brother, and made his home with him; at death of the latter he had continued to live with the widow and her two small children, and conducted the farm for the joint benefit of his sister-in-law, her children and him-

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self. The precise ages of the parties were not disclosed, but from the testimony plaintiff appeared to have been about twenty-five years old, and defendant was probably ten years her senior at time of their union. Defendant took his bride to the house of his widowed sister-in-law to reside; undoubtedly the surroundings of this new life proved distasteful to plaintiff and the hard work upon the farm soon became laborious, and almost from the first she showed great dissatisfaction, and, as recited, after a brief trial she departed, and began a proceeding for divorce which was dismissed, when the defendant, after much persuasion and earnest entreaties, prevailed on her to return upon the condition and assurance, that he should build a home for herself, where they could live away from the sister-in-law and children, and he fulfilled this promise by building a small house under her directions and according to plans approved by her. After completion and occupancy of the new dwelling by them, plaintiff's dissatisfaction continued unabated, and her final departure ensued, and this second suit for divorce was begun.

The causes of divorce set forth by plaintiff, and upon which she relied for legal separation, were that her husband was always quarrelsome and gruff to her and never had a kind or pleasant word for her; that they lived on a farm, and she did all the housework and cooking for them and a hired hand, and defendant's treatment of her was that of a hireling or servant woman working simply for her board, that he gave her no money to purchase clothes with, although a man in well-to-do circumstances, and they had barely sufficient articles in the house for housekeeping and he refused to let her buy necessary articles for housekeeping; that he refused to bring her to town to see her parents, or to let her have a horse to come to town, and she was forced to walk five or six miles to get to town; that he would insist on her rising as early as three o'clock in the morning to get breakfast, and when she declined would

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threaten her with violence, and but for the timely appearance of the hired hand might have done her bodily harm; that he frequently spoke disrespectfully of and cursed her mother; that he was dirty and filthy in his person, and would not wash, and kept himself in such condition thereby, that to come in contact with him as his wife was repulsive and loathing to plaintiff, and finally became intolerable.

The crossbill of defendant was based on the averments, that at the time of her first departure, before and thereafter, she accused him of having another woman, meaning defendant's sister-in-law, with whom he lived as his wife, all of which was absolutely untrue and to the great injustice of his sister-in-law as well as himself. That he had offered every inducement in his power to persuade her to return and live with him, that she demanded that he build her a home, and to induce plaintiff to again return and live with him, he did build a house, and she demanded in addition that he have his life insured for $2,000, and make her a deed to forty acres of land. That he declined the last proposition, but she returned to live with him after he built the house, but her conduct towards him became worse, and that she abused him, applied towards him names such as "old fool, jackass and scoundrel." That time and again she locked him out of the house, pulled his mustache and hair, slapped him in the face and rarely spoke a kind word to him. That when he was sick in bed for several days, he sent for plaintiff, who was then visiting her parents, and entreated her to come to him which she refused, declining to visit him or care for him. That she refused to cook for the hands during harvest, and insisted at such season upon going to town when defendant was exceedingly busy with the harvest. That she told him repeatedly she did not love him, but hated him, and would not live with him, and that there were other men in the world besides him and some of them had hugged and kissed her. These, the chief allegations contained

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in both petition and crossbill, are thus substantially reproduced, because it is not deemed essential to epitomize the bulky record exhibiting the lengthy examination of the numerous witnesses produced.

The testimony of the plaintiff herself substantiated the grounds of her petition fully and in detail. Of her family her mother testified, but her evidence did not confirm the statements of plaintiff, nor touch upon any material fact. The testimony of a married sister, however, in a measure and within limits, corroborated the evidence of plaintiff; this witness deposed, that while she was visiting them, plaintiff was ill at night, and affiant had been compelled to go to her aid, as defendant continued to slumber undisturbed and indifferent. Also that deponent, on one occasion when the children had been summarily left by their mother, and were dirty, plaintiff and herself had cleaned and cared for them, but they cried and annoyed plaintiff, and witness suggested to defendant that he ought to take his wife away, that she could not bother with these children and with profanity and anger he replied it was none of her business. That defendant accused plaintiff to this witness of laziness, indolence and extravagance and swore at her. To this meagre extent and no further did the statements of plaintiff receive support and confirmation by any other testimony, while they were denied and refuted, not only by defendant and his sister-in-law, but by the avowals of the many witnesses examined on behalf of defendant. This latter testimony was elicited from the tradesmen with whom defendant had dealt for many years; many of his neighbors, knowing him all his life, who were familiar with his habits and mode of life, and had frequent and daily opportunities to observe and judge of his personal conduct, and witness his deportment towards his wife and his sister-in-law; the carpenter and his assistant who aided in planning the house and built it, and during its construction lived with defendant; the contractor who plastered the house,

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worked on it and the barn, and also resided at the house of plaintiff for four weeks during the work; the cashier of the bank, with which defendant transacted business, and who, at his solicitation, called on plaintiff after the first separation to bring about a reconciliation; the negro hand, who had worked for defendant for seventeen years; the white farm hand who was with defendant when the new house was erected; the owner of the threshing machine who threshed defendant's wheat; in a word, about all the persons who, in the narrow routine and course of defendant's daily life had been brought into close and familiar intercourse with him for many years, inclusive of the period of his marriage, appeared at the trial and gave their testimony. These witnesses, in unbroken line, negatived emphatically the accusations and complaints made by the plaintiff in her petition and by her testimony and some in one detail and some in other particulars, all tended to confirm and verify the grounds of divorce advanced on defendant's behalf. From this mass of testimony, the conclusion is irresistibly drawn and it was established as facts beyond doubt, that defendant lived in a plain manner but in the usual style befitting his class; that his personal habits respecting cleanliness of person were criticized without just cause, that his sister-in-law was a woman of honest, upright and admirable character, industrious in her habits, who after her husband's death had endeavored to take his place, as far as she could, in continuing the farming partnership existing between him and her brother-in-law, and bring up her small children. That the imputations upon her conduct and insinuations of her relations with the defendant, her brother-in-law, were wholly unfounded and grossly unjust to her. That defendant himself was a plain, industrious, unassuming citizen, engaged diligently in farming pursuits, and during his brief marital experience had discharged his duties towards plaintiff as her husband, with kindness and affection, and that his deportment to-

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wards her had been characterized by a degree of patience, kindness and forgiveness rarely encountered. That the base charges made against him imputing improper relations with the widow of his dead brother, to whom it appeared he was sincerely attached and whose death he continued to lament, were wholly untrue and devoid of any foundation. Upon a careful review and consideration of the voluminous testimony submitted, we have no hesitancy in concluding that defendant was the innocent and injured party, and that he fully made out the allegations of his crossbill and is entitled to the relief afforded by the statute. The judgment dismissing plaintiff's petition is accordingly affirmed, and the order awarding plaintiff temporary alimony is reversed, but the allowance for attorney's fees and for suit money is affirmed, and the judgment dismissing defendant's crossbill is reversed and the cause remanded with directions to the trial court to award him a decree of divorce from plaintiff. *Bland, P. J.*, and *Goode, J.*, concur.

STARK et al., Appellants, v. ANDERSON et al., Respondents.

St. Louis Court of Appeals, January 19, 1904.

1. **HOMESTEAD: Incumbrance by Husband: Dower: Filing Claim by Wife.** Prior to the law of 1895, the husband could sell or encumber the homestead, subject to the wife's inchoate right of dower, except where the wife had filed her claim as provided by section 5435, Revised Statutes of 1899.

2. ——: ——: ——. Where, however, the wife is not a party to the contract by which the husband encumbers the property, her rights, whether originating from the marriage or otherwise, are not affected.

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3. ——: ——: ——. **Fruit trees do not constitute such an improvement upon land, an equitable lien for which, created by contract with the husband, is paramount to the rights of the wife.**

4. **CONTRACT: Interest. A contract for the purchase of fruit trees, providing that they were to be paid for by "one-half the gross amount of sales from the crop each year, etc., to be credited hereon from year to year until the full amount, together with six per cent compound interest shall be paid, and the final payment shall be made within ten years, regardless of the amount paid from year to year, if the amount shall not be paid prior thereto," is a contract to pay the principal with interest compounded annually from date of the contract.**

Appeal from Crawford Circuit Court.—*Hon. L. B. Woodside*, Judge.

Reversed and remanded (*with directions*).

A. H. Harrison and *Pearson & Pearson* for appellants.

(1) Under the "Homestead Law" of this State, prior to the enactment and amendment of 1895, the husband as the owner of the land, and the head of a family, could either sell or incumber such land, without the wife joining in the execution of such instrument; and the same could be subjected to foreclosure proceedings, to satisfy debt which the lien was created to secure. Gladney v. Sydnor (Supreme Court of Mo. Div. No. 2), 72 S. W. 554; Tucker v. Wells, 111 Mo. 399; Greer v. Major, 114 Mo. 145; Kopp v. Blessing et al., 121 Mo. 391; Markwell v. Markwell, 157 Mo. 326; Chadwick v. Clapp, 69 Ill. 119. (2) The instrument, or contract sued on, and made the basis of this foreclosure proceeding, is in effect an equitable mortgage, and, amply sufficient to charge the land described therein, with a lien, as against both the defendants, H. R. and Rebecca Anderson, notwithstanding the fact, that at the time of the execution thereof, it may have been homestead of the

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said H. R. Anderson. Martin v. Martin, 92 Mo. 26, l. c. 34; McQuie v. Peay, 58 Mo. 56; 1 Am. Leading Cases in Eq., 510; Howes case, Paige 125; Raconillat v. Sansevain, 32 Cal. 376; First National Bank of Joliet v. Adams et. al., 34 Ill. App. 159. (3) The debt, which the lien of the contract or mortgage was created to secure, was for the purpose of placing improvements upon the land described in the mortgage. For that reason, the defendant, Rebecca Anderson, the wife of H. R. Anderson, can not avail herself of a defense that she did not sign said contract or mortgage and therefore defeat the enforcement of such lien, in foreclosure proceedings, brought to satisfy the debt for which the lien was created or secure the payment of, on the claim that the same was a homestead; she, as the wife of the defendant, H. R. Anderson, having never filed any claim to a homestead in the land described in the contract or mortgage as provided by section 5435, R. S. 1889. See authorities cited, under division No. 1; Thompson on Homestead and Exemptions, page 375, Wapples on Homestead and Exemptions, page 361; Greenwood v. Maddock, 27 Ark. 660; U. S. Inv. Co. v. Phelps & Biglow Windmill Co., 54 Kan. 144; Bush v. Scott et al., 76 Ill. 524.

STATEMENT.

This action involves the construction of legal effect of the following agreement executed by plaintiffs and defendant Anderson, namely:

"This indenture made and entered into the 21st day of October, A. D. 1891, by and between H. R. Anderson, Jakes Prairie, P. O......, Miles....Direction ......, of the county of Crawford, and State of Missouri, party of the first part, and C. M. Stark, E. W. Stark, and W. P. Stark, doing an orchard business under the firm name of Stark Bros. at Louisiana, in county of Pike, State of Missouri, parties of the second part.

"Witnesseth, that the said party of the first part in consideration of the second parties furnishing to him six hundred fruit trees, said trees to be furnished in the fall, 1891, as per order given by said first party, binds himself to plant in the usual and customary manner, to take good care of same and give good attention to them, said trees to be planted and set out on his farm situated in Crawford county, State of Missouri, and more particularly described as follows; to-wit, lot 6, northeast quarter and lot 5, northwest quarter of section five (5), township thirty-nine (39), range five (5) west, containing 182 and 41-100 acres, for which said first party binds himself and his heirs to pay the said second parties the sum of one hundred and eight dollars ($108) due and payable as follows:

"One-half of the gross amount of the sales from the crop each year said first party agrees to remit, which is to be credited hereon from year to year until the full amount, together with six per cent compound interest shall be paid, and the final payment shall be made within ten (10) years from date regardless of the amount paid from year to year, if the amount shall not be paid prior thereto.

"And it is also understood and agreed by said first party, by his heirs and assigns, that this shall be a lien upon the above described premises or real estate until the full amount together with interest shall be paid, and should said first party fail to pay the amount together with the interest, said real estate shall be subjected to the payment of the above named amount and the said first party for the purpose of obtaining this loan states that the above property is free and clear of incumbrances and that he claims the same with a perfect title.

"In witness whereof we have hereunto set our hands and seals this day and year last aforesaid.

"H. R. ANDERSON, (Seal)
"STARK BROS. (Seal)

"Witnessed by M. A. ARTHUR."

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After acknowledgment by defendant Anderson, the instrument was filed for record and recorded in the recorder's office of Crawford county, October 30, 1891. The petition averred sale and delivery to defendant H. R. Anderson of 600 fruit trees at his instance and request, his agreement to set out the trees on the land described, and the terms of payment provided by the contract which was filed as part of the petition; that the trees were delivered according to contract and by Anderson planted upon above land; a default in payment under the contract is averred and the amount of $108 with interest at the rate of 6 per cent compounded annually is claimed as due and unpaid, for which demand and non-payment are averred. Proceeding, the petition described two conveyances subsequent to the execution of the contract whereby the title to the realty was conveyed to his co-defendant, his wife, by H. R. Anderson, and which conveyances are alleged to have been made subject to the lien of plaintiffs for the amount due under the contract. The petition concludes with a prayer for judgment for the amount as above computed, that such judgment be made a lien upon the land described; that all equities of redemption be foreclosed, said lien enforced and the realty, or as much as might be necessary to satisfy the judgment and costs, be sold, and a special execution therefor issue.

The joint answer of defendants was a summary general denial.

The facts established at the trial were that two shipments of trees were consigned by plaintiff to defendant, H. R. Anderson, after the execution of the contract, the first lot being rejected, and upon his objection to the first, the second lot was forwarded, accepted and planted on the realty mentioned, but no payment of the purchase price had ever been made. The defendant, H. R. Anderson, deposed, additional to corroborating above facts, that he lived on the tract of land at the time as his homestead; the court rendered a general judg-

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ment against him for the principal of the agreed price, with simple interest accrued from the maturity of the contract, aggregating February, 1903, per judgment then entered, $116.64, but adjudged that the contract bore no interest until maturity and was not sufficient to impose a lien on the land as against defendant, Rebecca Anderson, by reason of its being the homestead of her husband at the time of its execution, and rendered judgment in her favor.

REYBURN, J. (after stating the facts as above). —1. The instrument evidencing the terms of sale of the trees, under the doctrine recognized long since in this State, constituted an equitable lien or mortgage upon the realty affected against H. R. Anderson. Martin v. Nixon, 92 Mo. loc. cit. 34. Whatever may have been the authority, if any, existing at time of the judgment herein, upon which the trial judge relied in the conclusion reached by him, a decision of the Supreme Court since announced has placed a construction upon the statutory provisions then controlling homesteads, antagonistic to the judgment appealed from. In the language of Judge Fox, rendering the opinion: "Under the well-settled law of this State, prior to the enactment of the statute of 1895, it is beyond dispute that the husband could sell or encumber the homestead, subject to the wife's inchoate right of dower, except where the wife had filed her claim as provided by section 5435, R. S. 1899." Gladney v. Sydnor, 72 S. W. 554. In the light of this decision, the husband's right at the time of the transaction to impose a lien upon the realty, even if it were homestead property, without the wife uniting with him, in absence of the statutory claim perfected by her, is conclusively settled. The wife, however, was neither made a party to the contract, nor did she join in its execution, and her rights to the realty concerned, whether marital or otherwise originating, existed at the time of the contract, were not thereby im-

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paired or disturbed. No authority in this State, statutory or otherwise, has been invoked to sustain appellant's contention, that the trees were such improvements upon the land as to constitute a lien thereon paramount to such rights of Rebecca Anderson.

2. The language of the contract providing for payment of the contract price, while not free from obscurity, upon careful analysis, is to be interpreted as contracting for payment of the principal with interest at rate of six per cent per annum, compounded annually, from October 21, 1891, the date of the instrument.

The judgment is accordingly reversed and the cause remanded, with directions to enter a decree embracing a finding for $108 and interest thereon computed at rate of 6 per cent per annum from October 21, 1891, compounded annually; that this amount with costs of this action, be a general judgment against defendant H. R. Anderson, and further be decreed a lien on the realty described in the petition; that all equities of redemption be foreclosed and said realty, or so much thereof as may be necessary to satisfy said finding and judgment and all costs of this suit, be sold and that a special execution or *fieri facias* be issued accordingly. *Bland, P. J.,* and *Goode, J.,* concur.

CROOKER SHOE COMPANY, Respondent, v. FRY, Appellant.

St. Louis Court of Appeals, January 19, 1904.

1. **JUSTICES OF THE PEACE: Default: Setting Aside Judgment.** Under Section 3939, Revised Statutes of 1899, a justice of the peace has no power to set aside a judgment by default except at the instance of the defendant or his agent; he can not set it aside at the instance of the plaintiff.

2. **———: ———: Collateral Attack: Insufficient Service.** A judgment by default, rendered by a justice of the peace upon service within and less than the period provided by law, is not subject to collateral attack for insufficiency of service.

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Appeal from Louisiana Court of Common Pleas.—*Hon. D. H. Eby,* Judge.

Reversed.

Ball & Sparrow for appellant.

(1) The first question to be solved is, is the judgment so rendered by said justice void or voidable. 1 Black on Judgments, sec. 170; Leonard v. Sparks, 117 Mo. 103 and authorities cited; Westmeyer v. Gallenkamp, 154 Mo. 28. From the foregoing authorities the condition is, that the judgment rendered by said justice was, and is, good until defendant takes the proper legal steps to have it set aside. (2) But as a matter of fact the said justice did attempt to declare the judgment, at the instance of plaintiff a nullity. The question presents itself at once, what legal authority did the justice have for so doing. The justice court being purely a statutory court its authority must be found in the statutes, or the act of the justice is a nullity. A justice of the peace can only set aside a judgment in two cases—nonsuit and default. R. S. 1899, sec. 3969; Langford v. City of Doniphan, 61 Mo. App. 288; State ex rel. v. Hopper, 72 Mo. App. 171. (3) If the judgment rendered as above stated is only voidable and not void, then the justice acquired no jurisdiction in the second suit, and on appeal the appellate court acquired none. Leith v. Shingleton, 42 Mo. App. 449. (4) The second suit being between the same parties and the same subject-matter as the first, can not be again heard, because the same has been adjudicated. Murphy v. D. Franer, 101 Mo. 151; State ex rel. v. Caste, 36 Mo. 437; Henry v. Woods, 77 Mo. 277; Mason v. Summers, 24 Mo. App. 174.

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E. E. Campbell for respondent.

(1) It is conceded that the judgment rendered by the justice of the peace in this cause April 9, 1903, was a judgment by default; therefore the cases cited by respondent on this point do not apply as in both Langford v. City of Doniphan, 61 Mo. App. 288, and State ex rel. Shenault v. Hopper, 72 Mo. App. 171, there were appearances on the part of defendant. Both these cases and others hold that in such cases as the one at bar, the essential requirement is that it must be a default judgment before the justice has power to set it aside. Borgwald v. Fleming, 69 Mo. 212; Leith v. Shingleton, 42 Mo. App. 449. (2) The irregularity as to time of service was good cause for the justice setting aside the judgment by default. The want of adherence to some prescribed rule will warrant the setting aside of a judgment. Woodward v. Woodward, 84 Mo. App. 328; Reid Bros. v. R. D. O. Nicholson, 93 Ill. App. 29.

REYBURN, J.—On April 10, 1903, plaintiff, respondent herein, brought an action upon an account against defendant, appellant herein, before a justice of the peace in Pike county, and recovered judgment by default from which an appeal was taken to the Louisiana court of common pleas. Upon trial anew, appellant admitted the correctness of the account sued on, but interposed as his defense the plea of former adjudication, and substantiated it by establishing that on March 31, 1903, respondent instituted an action against him before the same magistrate on the same account, and the summons issued and service was had on that date, made returnable April 9, 1903, when the justice rendered judgment by default for the amount asked. On April 10th the justice, at request of plaintiff, set aside the judgment as invalid for want of proper service, and the respondent instituted the second action

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above detailed. From judgment for plaintiff in the court of common pleas, defendant has appealed.

The justice's court being of statutory origin, was circumscribed and confined within the bounds of the provisions of the statute, and could not transcend the powers and authority thereby conferred. Section 3969, R. S. 1899, prescribes when and in what manner a justice shall have power to set aside a judgment by default. The action of the justice in setting aside the first judgment was not empowered by the statute and was without jurisdiction and the judgment remained in full force. The statute authorized this judgment to be set aside by the justice at instance of defendant or his agent but not otherwise.

In Leonard v. Sparks, 117 Mo. 103, the Supreme Court in an exhaustive opinion arraying the conflicting authorities in this State and other jurisdictions, considered the effect of a judgment of a justice rendered upon service within and less than the period provided by law, and held such judgment valid and not subject to attack collaterally because of the insufficiency of the service. It follows, therefore, that the judgment of the trial court was erroneous and it is reversed. *Bland, P. J.*, and *Goode, J.*, concur.

RODGERS et al., Appellants, v. KALLMEYER et al., Respondents.

St. Louis Court of Appeals, January 19, 1904.

APPEAL: Final Judgment: Ruling on Demurrer. No appeal will lie from a judgment overruling or sustaining a demurrer under the provision of Section 806, Revised Statutes of 1899.

Appeal from Montgomery Circuit Court.—*Hon. E. M. Hughes*, Judge.

APPEAL DISMISSED.

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John M. Barker for appellants.

E. Rosenberger & Son for respondents.

(1) An appeal, or writ of error, lies only from a final judgment and neither will lie from a judgment overruling or sustaining a demurrer. Sec. 806, R. S. 1899; Holloway v. Holloway, 97 Mo. 639; Mills v. McDaniels, 59 Mo. App. 331; City of Plattsburg v. Allen et al., 84 Mo. App. 432. (2) Only those rulings of the circuit court can be reviewed by this court to which exceptions have been saved. No exceptions having been saved to the various rulings of the circuit court, of which appellants complain there is nothing for this court to review.

REYBURN, J.—The petition filed in this proceeding was unavoidably lengthy, but summarized, the action was entitled to construe and reform the will of Thomas J. Powell, deceased, and was instituted by appellants, Jacob R. Rodgers, Nancy V., his wife, James H. Powell and Mary Fanny Devault against the administrators with an annexed estate of Thomas J. Powell, deceased, and the legatees and devisees under such will; the plaintiffs Nancy V. Rodgers, Mary Fanny Devault and James H. Powell being children of the testator. The object of the action and prayer of the complainant was to have plaintiff, James H. Powell, declared a pretermitted heir, and also to have the will construed or reformed so as to relieve his coplaintiff Nancy V. Rodgers from payment of interest upon a note described, to conform to the alleged intention of the testator. Defendants filed a joint demurrer to the petition on the ground that it failed to state facts sufficient to constitute a cause of action against defendants. Upon submission, the court sustained the demurrer only to those portions of the petition relating to the relief sought by Nancy V. Rodgers,

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and on the same day the court further entered an order as follows:

"Now at this day this cause coming on to be heard, the plaintiffs appear by their attorney, John M. Barker, and the defendants appear by their attorneys, E. Rosenberger & Son, and the cause being called for trial, both parties announcing themselves ready for trial, whereupon said cause is submitted to the court upon the pleadings in the cause and after listening to the argument of the attorneys the court construes the will of Thomas J. Powell as to the ninth item of said will to be:

"'The court considering the will as to the ninth item of said will finds that James H. Powell, one of the children of the testator, Thomas J. Powell, is not provided for therein, and that the court further finds, that it was the intention of the testator that all of his thirteen children share alike, and subject to whatever advancements he had made to them, and that it was the intention of the said testator that each one of his thirteen children, including the said James H. Powell, should take a one-thirteenth part of the residuary assets of said estate subject to whatever advancements he had made to them and that through the neglect or inadvertence of the scrivener who drew said will the said Thomas J. Powell was inadvertently omitted from sharing in the residuary assets.

"And the court further finds that the said James H. Powell is a pretermitted heir as to the one-thirteenth part of the residuary assets of the estate of Thomas J. Powell, deceased, and the plaintiff consents to the construction of the court in open court as to James H. Powell, only.

"It is further adjudged that the plaintiffs have and recover of the defendants their costs in this behalf expended and that execution issue therefor."

Plaintiffs, Jacob R. and Nancy V. Rodgers, then moved in arrest, and also filed motion to set aside the judgment rendered upon the demurrer, and proceed

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with the trial upon the petition and on the merits of the case. No action by the court upon these motions appears in the abstract of record prepared, nor does it exhibit any exceptions saved by appellants.

The judgment herein merely sustaining the demurrer to a portion of the petition was not such judgment as an appeal would lie from under the provisions of the statute. R. S. 1899, sec. 806. No appeal will lie from a judgment overruling or sustaining a demurrer. City of Plattsburg v. Allen, 84 Mo. App. 432. It follows that this court is devoid of jurisdiction of the cause and the appeal is accordingly dismissed. *Bland, P. J.*, and *Goode, J.*, concur.

THE WARDER, BUSHNELL AND GLESSNER COMPANY, Respondent, v. LIBBY, Appellant.

St. Louis Court of Appeals, January 19, 1904.

1. **JUSTICES OF THE PEACE: Lost Note: Affidavit.** A statement filed with the justice verified by affidavit of plaintiff's counsel, comprising a statement of the loss or destruction of the notes involved, accompanied by copies of the notes, authenticated by the affidavit of an officer of plaintiff, is sufficient compliance with section 3854, Revised Statutes of 1899.

2. **LOST NOTE: Indemnifying Bond: Approval of Bond.** Under section 745, Revised Statutes of 1899, in an action on lost notes, where the indemnifying bond required is filed prior to the trial and the approval thereof shown on the clerk's minute book, such entry will be presumed to have been made under direction of the court.

Appeal from Pike Circuit Court.—*Hon. D. H. Eby*, Judge.

AFFIRMED.

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J. H. Blair & Son for appellant.

(1) The trial court should have sustained the defendant's motion to dismiss the cause for the reasons stated therein, because: (a) There should have been a sworn statement filed as the cause of action, alleging the loss of the notes and stating their substance. R. S. 1899, sec. 3854; Wise v. Loring, 54 Mo. App. 258. This was a jurisdictional requirement. Summons could not be issued until it was done, and that fact must appear from the justice's transcript or the sworn statement. R. S. 1899, sec. 3852 and 3854; Rechnitzer v. Candy Co., 82 Mo. App. 311; Ewing v. Donnelly, 20 Mo. App. 6; Sutton v. Cole, 155 Mo. 213; Fletcher v. Keyte, 66 Mo. 285; Cunningham v. Railroad, 61 Mo. 33. Similar requirements in replevin cases have been held jurisdictional. Dowdy v. Womble, 41 Mo. App. 573; Frederick v. Tiffin, 22 Mo. App. 443; Dollman v. Munson, 90 Mo. 85; Madkin v. Trice, 65 Mo. 656; Gist v. Loring, 60 Mo. 487. The facts must affirmatively appear on the face of the proceedings. Warden v. Railroad, 78 Mo. App. 664; Bank v. Doak, 75 Mo. App. 332. (b) The issue as to whether plaintiff complied with the requirements of section 3854, R. S. 1899, was adjudged adversely on the plaintiff June 14, 1901, on the trial of its motion to require the justice to amend his docket entries, and not having been appealed from is a final determination of that issue in all subsequent proceedings in the case. Sherer v. Akers, 74 Mo. App. 222. (2) The indemnifying bond filed by plaintiff was not approved by the court. No judgment could be rendered in the case until the bond was so approved. R. S. 1899, sec. 745; Eans v. Bank, 79 Mo. 182; Barrows v. Million, 43 Mo. App. 79.

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W. W. Botts for respondent.

(1) The fact of the filing of these sworn copies with the justice when the suit was instituted sufficiently appears from the record and the evidence and need not necessarily appear from the justice's docket. State v. Simpson, 67 Mo. 647; Railroad v. Holliday, 131 Mo. 440; R. S. 1899, sec. 4560. (2) The indemnifying bond filed by plaintiff in this cause was approved by the court on the day of trial as appears from the record entry in the clerk's minute book. This entry is as much a part of the record as if it had been formally spread upon the record proper. Gay v. Rodgers, 108 Ala. 624; State v. Carroll, 38 Conn. 449; Read v. Sutton, 2 Cush. (Mass.) 115; Morgan v. Bennett, 18 Ohio 535.

STATEMENT.

In June, 1896, plaintiff, an Ohio corporation, through its agents at Vandalia, sold to defendant a Champion binder, which was delivered to defendant, set up and operated on his farm. The contract of purchase was in form of a written order addressed to the agents by defendant, containing an agreement to pay $120 in installments to be evidenced by notes executed upon receipt of the machine, or later, when demanded; the instrument contained warranties by vendor of material, make and durability. Shortly after the machine was started, complaint of a defect or imperfection was made to the selling agents by the purchaser, and a new roller adjusted and the machine continued in use to the time of trial. After the first season in which the appliance had been used and tested, defendant delivered to plaintiff's agents the notes required by the terms of sale, the first of which was paid when due, but the other two for $30 and $60 respectively, payable severally on or before the first days of January and October, 1897, after delivery, were forwarded by the agents to the office

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of plaintiff at Chicago, and remitted at maturity to a bank at Vandalia for collection and all trace of them disappeared. In October, 1900, plaintiff brought suit upon them before a justice of the peace in Pike county, from which court, after sundry proceedings, all the papers relating to the action disappeared; shortly after the official term of the justice expired, and this proceeding originated March, 1901, by a motion by defendant in the circuit court for a rule on the succeeding justice to amend his records, and file a complete transcript of the docket of his predecessor in office, which was sustained; in June, 1901, plaintiff filed in the circuit court a verified copy of the original statement of the cause of action filed before the justice, which described the notes, alleged non-payment, with prayer for judgment, and averred their loss and destruction, for which reason, they could not be filed, but stated that correct verified copies accompanied the petition; at the same time plaintiff filed a motion to require the justice then in office to amend the docket entries in the cause, so as to show that plaintiff had filed for suit verified copies of the notes and had deposited an amount of cash as security for costs with the constable, which motion was denied, and later the justice, in obedience to the rule granted earlier on defendant's motion, filed a complete transcript of his amended record. This transcript contained recitals that plaintiff had filed a claim against defendant and summons thereon had been issued and placed in the hands of the constable of the township and made returnable October 25, 1900, on which date the cause coming on for trial, a motion for security for costs was filed by defendant and a continuance granted to November 1, 1900, when defendant defaulting, and plaintiff appearing, the justice proceeded to hear the evidence in support of plaintiff's claim and the notes having been lost, the plaintiff produced certified copies and filed indemnifying bond in the sum of $250. After hearing the evidence, the justice found that defendant was indebted to

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plaintiff in the sum named, and rendered judgment accordingly; and on the fifth of November, following, defendant perfected his appeal, and an appeal was granted by the justice to the circuit court of Pike county. On the fourteenth of October, 1902, plaintiff filed in the circuit court an indemnifying bond in due form with sureties: the regular minute book of the clerk showed the approval of this bond by the court, which entry, however, by inadvertence or oversight, was not, in accordance with the custom and practice, prevailing, transferred in more extended form on the records of the court, as is shown by a certificate of the circuit clerk. October 22, 1902, defendant filed and the court overruled a motion to dismiss, and the trial proceeded before a jury and terminated in a verdict for $125.81, from judgment upon which this appeal has been duly taken.

The evidence of plaintiff, oral, documentary and in form of depositions tended to prove the averments of plaintiff's complaint. In his defense defendant, by his own testimony, as well as by some of his neighbors, who saw the machine, sought to establish a breach of the terms of the contract, by showing that the machine delivered did not perform the work well, and in their opinion was not a first-class machine.

REYBURN, J. (after stating the facts as above.)—
1. Appellant urges that the motion to dismiss was erroneously overruled, as there should have been a sworn statement filed as the cause of action, alleging the loss of the notes and stating their substance. Section 3854, R. S. 1899, requires that if the instrument in writing, upon which the action is founded (which by the preceding section is required to be filed with the justice), is alleged to be lost or destroyed, it shall be sufficient for the plaintiff to file with the justice, the affidavit of himself or some other credible person, stating such loss or destruction, and setting forth the substance of such in-

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strument. The original statement, which the evidence established, was filed with the justice, and a copy of which was a part of the record in the trial court, was composed of a comprehensive petition verified by affidavit of plaintiff's counsel, comprising among other appropriate allegations, a statement of the loss or destruction of the notes involved, the substance of which were fully set forth, and this petition was accompanied by copies of the notes authenticated by affidavit of an officer of plaintiff. The obvious purpose of the enactment was attained, and in truth the terms of the statute were literally and carefully complied with. It may be remarked that independent of the statute, a court has the power of supplying its missing papers, records or files. Railroad v. Holladay, 131 Mo. 440; State v. Simpson, 62 Mo. 647.

2. Appellant next insists that the indemnifying bond was not approved by the court, and no judgment could be rendered until such approval. Until the enactment of the present statute (R. S. 1879, sec. 3652, now section 745, R. S. 1899) no action at law could be maintained upon such lost instrument, but the remedy of its holder was in equity, and usually granted with such conditions of recovery by requirement of indemnifying bond or otherwise, as might be deemed equitable. Barrows v. Million, 43 Mo. App. 79. In construing this section the Supreme Court has held that the petition need not state the bond of indemnity has been given, but the plaintiff must execute the bond before the court can render judgment in his favor. Eans v. Bank, 79 Mo. 182. In the present proceeding the bond was filed prior to the trial, and its approval by the court was sufficiently shown by the entry in the clerk's minute book, even though such memorandum of approval was not transcribed into the record book proper; such entry will be presumed to have been made by the direction of the court and by the clerk under proper authority. Read

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v. Sutton, 2 Cush. (Mass.) 115. The bond having been tendered and the judgment rendered thereafter, the presumption might fairly be indulged in that it had been approved and ordered filed by the court. "Acts done which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter." Macey v. Stark, 116 Mo. 481.

3. The case was submitted to the jury upon a charge embracing three instructions asked by plaintiff, two given by the court of its own instance, and one asked by defendant; two of defendant's instructions being declined. These instructions submitted the issues raised as favorably to defendant as the law justified, and afforded the jury full latitude to reduce the amount of the notes by such credit in favor of defendant to which they might believe him entitled under the evidence in his behalf and their finding is conclusive upon such controverted questions.

After a full consideration of all the objections encountered in the brief and argument of defendant, including such as have not been deemed to require specific review and refutation, no reversible error of the trial court has been revealed, and the judgment is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

RITCHEY, Respondent, v. HOME INSURANCE COMPANY, Appellant.

St. Louis Court of Appeals, January 19, 1904.

1. **INSURANCE: Value of Property: Statute Conclusive. The statutes of the State, section 7969, 7970 and 7979, Revised Statutes, 1899, relating to fire insurance become a part of a policy of insurance by implication, as if embodied therein, and all stipulations of the policy must yield to the statute.**

2. **———: ———: Fraudulent Representations: Evidence. In an action on a policy of fire insurance, covering a building on real estate, where the defense is that the policy was obtained by**

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fraudulent representations as to the value of the property, but the answer failed to state that the policy would not have been issued had the company known the real state of the facts, and where there was no written application for the policy, oral evidence as to such fraudulent representation was properly excluded.

3. ——: ——: ——: ——. Where the policy authorized cancellation at any time by the company and the evidence showed that the soliciting agent, who took the policy, was familiar with the property insured, it is too late, after the loss is sustained, to pray in the answer to have the contract annulled on account of the fraudulent representations as to the value.

Appeal from Clark Circuit Court.—*Hon. E. R. McKee*, Judge.

AFFIRMED.

Fyke Bros., Snider & Richardson and *Whiteside & Yant* for appellant.

(1) The court erred in sustaining plaintiff's objection to the evidence offered by defendant tending to show that the policy was obtained by fraudulent representations as to the value of the building. This evidence seems to have been excluded upon the theory that the valued policy law had some bearing upon the question. But it has not. It may be that defendant, if liable at all would be liable for the face of the policy. But if the policy was fraudulently obtained no recovery could be had, because fraud vitiates. School District v. Ins. Co., 61 Mo. App. 597; Maddox v. Ins. Co., 56 Mo. App. 343; Lama v. Ins. Co., 51 Mo. App. 447. (2) The value of building insured is material as a matter of law. To insure a building worth $400 for $1,500 would certainly be material to the risk.

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W. T. Rutherford for respondent.

(1) The court did not err in sustaining plaintiff's objection to the evidence offered by defendant tending to show that the policy was obtained by fraudulent representations as to the value of the building. Sec. 7969, R. S. 1899; Sec. 7979, R. S. 1899; Williams v. Fire Ins. Co., 73 Mo. App. 607; Gibson v. Ins. Co., 82 Mo. 575. It was necessary for the answer to state (which it does not) that the policy would not have been issued, but for the false statements concerning the occupancy and the value of the building. Ins. Co. v. Simmons, 69 N. W. (Neb.) 134; Ins. Co. v. Mfg. Co., 49 S. W. (Tex.) 222-225; Christian v. Ins. Co., 143 Mo. 464; Levi v. Ins. Co., 39 N. E. (Mass.) 792; Ins. Co. v. Golden, 23 N. E. 508; Ins. Co. v. Combs, 49 N. E. 411; Summers v. Ins. Co., 80 Mo. App. 691. (2) Any representations made by the assured, to be available to defendant, must have been made in writing and made a part of the policy issued and sued upon, for the reason that the contract could not be partly in writing and part oral, and the representations concerning the value of the building must have been made prior to the issuance and delivery of the policy to induce its issuance. May on Ins. (4 Ed.), sec. 192; Ostrander on Ins. (1 Ed.), sec. 358; State ex rel. Yeoman v. Hoshaw, 98 Mo. 358; Pearson v. Carson, 69 Mo. 550; Bast v. Bank, 101 U. S. 93; Kent's Com. (13 Ed.), side p. *556; Sec. 7973, R. S. 1899; Sec. 7974, R. S. 1899. (3) It is too late after a loss has occurred under a policy of insurance to have it declared null and void on account of fraud exercised in obtaining the policy. If the statements of respondent concerning the value of the building were warranties or misrepresentations, still it would not be a defense, and fraudulent statements to the same effect could not take the place of warranties. Schuerman v. Ins. Co., 165 Mo. 641; Kern v. Legion of Honor, 167 Mo. 471.

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REYBURN, J.—This action is upon a policy of insurance issued December 27, 1901, covering "$1,500 on the shingle roof frame building and additions, including foundations, occupied as a private house." January 4, 1902, consent was endorsed on the policy for occupancy of the barn by a careful tenant, and January 22, 1902, the barn was burned. From judgment upon the verdict of the jury in favor of plaintiff, defendant has appealed and in this court chiefly one objection to the judgment below is encountered; namely, that defendant was not permitted to introduce evidence tending to prove that the policy was obtained by fraudulent representations anterior to the issuance of the policy respecting the value of the building, which was material to the risk. There was no written application taken for the policy, and it was solicited and obtained by the local agent of appellant, and the conversations between this agent and plaintiff in the negotiations preliminary to his acceptance of the risk, were sought to be elicited and were excluded by the court upon objections thereto by plaintiff. At the threshold of the case it may be stated that the answer contained no averment that but for the alleged false statements the policy would not have been issued.

In Christian v. Ins. Co., 143 Mo. 460, the Supreme Court intimated that unless the answer pleads that the policy would not have been issued had the company known the real state of the facts, no issue of misrepresentation is made, and in Summers v. Ins. Co., 90 Mo. App. 691, this court, citing the above decision, held an answer insufficient containing no allegation that defendant would not have issued the policy had it known the real state of facts misrepresented by assured in his application. While this principle is thus invoked and made applicable in this State to accident and life insurance policies, by analogy it would apply with equal force to insurance against fire and has been so directed in other jurisdictions. Aetna Ins. Co. v. Simmons, 69 N.

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W. (Neb.) 134. Sections 7969, 7970, and 7979 (R. S. 1899), being part of the statute law of this State, when this policy was issued, became a part of the contract by implication with the same effect as if embodied therein. Christian v. Ins. Co., supra. Or as expressed in Havens v. Ins. Co., 123 Mo. 403, all stipulations of the policy must yield tò the statute. Under the provisions of above sections, especially under the concluding clause of the section last named, the value of the property, the risk accepted and insured, was made conclusive and incontestable in policies affecting real property. Such was the view expressed by this court in case of Williams v. Ins. Co., 73 Mo. App. 607, where the presiding judge stated: "While it is not necessary to decide the point in this case, it seems to us that the question of the valuation of the house is eliminated from inquiry, for the reason that the policy is a valued one by the force and effect of section 5897, R. S. 1899. An attempt to evade the statute as to the value in the application and policy should not be sanctioned by the courts. The statute is as much a part of the policy as any clause or warranty written in it and should prevail against any warranty made in contravention of its provisions, because it is the law of the state and declaratory of its policy as to insurance of this class of property against loss by fire." The final sentence of section 7979 was the subject of construction in Gibson v. Ins. Co., 82 Mo. App. 515, where it was interpreted to limit insurance risks to three-fourths of the value of the property insured, and that the practical effect was to convert a policy upon chattels into a valued policy. This latter decision, however, appears to have escaped attention in later cases in the same court in Mills v. Ins. Co., 95 Mo. App. loc. cit. 217, as well as the succeeding case of Bode v. Ins. Co., where the Millis Case is considered, 77 S. W. 116. Without any construction of the above section 7979, our conclusion, however, remains fixed, that in this case involving a policy covering a building upon realty, and under the framing

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of the defense, the trial court did not err in excluding the evidence offered, tending to show that the policy was obtained by fraudulent representations of the value of the building. It may also, with plausibility and convincing force, be argued that after a loss has ensued on a policy of insurance, the prayer of the answer herein to have the contract cancelled and annulled on account of fraud exercised in obtaining it, is made too late. Such is the doctrine applied to policies of life insurance, and we know of no reason why it should not apply as forcibly to policies indemnifying against loss by fire. Kern v. Legion of Honor, 167 Mo. 471; Schureman v. Ins. Co., 165 Mo. 641. Especially in view of the following provisions of this policy, "this policy may be cancelled at any time by the assured, or the company, by notice given to that effect." While the defense above discussed is made the more prominent in appellant's argument, it is further urged in behalf of appellant that there was no evidence, that it knew that the building was used as a warehouse, or was occupied by more than one tenant, whereby, as averred in its answer, the risk was greatly increased, and, therefore, the instructions given submitting the issue of such knowledge on appellant's part were erroneous.

It is sufficient to dismiss these contentions with the response, that there was substantial testimony upon these issues introduced by plaintiff, and they were properly questions of fact for the jury, and so properly considered by the trial court and submitted under proper instructions. The testimony at the trial further disclosed that the soliciting agent had been the defendant's representative at Kahoka, his place of residence, for many years, and was familiar with the barn insured; that he passed it frequently, and was at a short distance from it and in plain view of it, when negotiating the policy here concerned. Under such a state of facts the language of the Supreme Court employed in Daggs v. Ins. Co., 136

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Mo. 382, in passing upon the validity of sections 5897 and 5898 is especially apt:

"The manifest policy of the statute is to prevent, rather than encourage, over-insurance, and to guard, as far as possible, against carelessness, and every inducement to destroy property in order to procure the insurance upon it. It was also designed to prevent insurance companies from taking reckless risks in order to obtain large premiums by advising them in advance that they would be held to the value agreed upon when the insurance was written.

"No company is bound to insure any piece of property without first making a survey and examination of the premises, and it is not compelled to insure the full value of them. But having the opportunity to inspect fully before insuring, and then fixing the amount of the risk, and receiving the premium based upon such valuation, it ought to be forever estopped, in case of a total loss, from denying the valuation agreed upon; and such was the law long before this statute was enacted."

The case was fairly tried, the instructions given correctly stated the law and the judgment is affirmed. *Bland, P. J.*, and *Goode J.*, concur.

CITY OF LOUISIANA, Respondent, v. McALLISTER, Appellant.

St. Louis Court of Appeals, January 19, 1904.

1. **MUNICIPAL CORPORATIONS: Special Assessment: Part Owner: Notice.** The owner of an undivided part interest in property abutting upon a street, improved by authority of the city, can not defend against an action by the city for his portion of the cost of such improvement, on the ground that his co-owners were not notified of the contemplated improvement.

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2. ——: ——: ——: Estoppel. Where such a part owner permitted the property to be assessed to him as sole owner, and paid taxes thereon as such, was notified as sole owner of the contemplated improvement and appeared before the city council to protest against it, remaining silent as to the true ownership, he is estopped to set up the defense of part ownership of the lot affected.

Appeal from Louisiana Court of Common Pleas.—*Hon. D. H. Eby*, Judge.

AFFIRMED.

Pearson & Pearson for appellant.

(1) The right of procedure, to allow a city to order a sidewalk to be built, or constructed, by the owner or owners of adjacent property, and if not so constructed by him or them, in a given time, after due notice, to construct it for him, or them, and charge his property with a lien for the payment of the same, is a statutory right and the provisions of such statutes in so charging such property with a lien for such improvements must be strictly complied with. Section 6261, R. S. 1899; Section 6262, R. S. 1899; Keith v. Bingham, 100 Mo. 300; West v. Porter, 89 Mo. App. 150; Guinotte v. Egelhoff, 64 Mo. App. 356; Shoenberg v. Heyer et al., 91 Mo. App. 389; Cole v. Skrainka, 105 Mo. 303. (2) Any procedure to charge a citizen's property with a lien for the benefit, or use of the public, without first giving such property-owner notice and a chance to protect it from such lien is a violation of the statutes and the Constitution of the State of Missouri and of the United States. Article 2, section 21, Const. Mo.; Article 5, Amended Const. U. S.; Cole v. Skrainka, supra, 308.

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James W. Reynolds for respondent.

(1) An owner who is notified can not be heard to complain because other owners were not notified. Elliott on Streets and Roads, sections 323 and 318. (2) If the other owners had also been notified he would be jointly liable with them for the whole bill. This judgment is only for his proportion of the bill with interest added, so his liability or burden is no greater than it would have been if all had been notified. The statutes provide that whenever any owner or owners are properly notified to construct a sidewalk in front of their property, and such owners fail or refuse to do so for fifteen days after said notice is personally served the city may cause such walk to be constructed and the expense shall be a lien on the owner of the property along which the walk was built. Secs. 6261 and 6262, R. S. 1899. (3) A lien may attach to an undivided interest in real estate. Van Ripper & Rogers v. Morten et al., 61 Mo. App. 440. The word "owner" within the purview of section 6262 does not mean the sole owner nor the holder of the exclusive legal title but it applies to any one having a lienable interest the same as mechanics' lien cases. Kline v. Perry, 51 Mo. App. 422; Seaman v. Paddock, 51 Mo. App. 465; Ambrose Mfg. Co. v. Gafin, 22 Mo. App. 397; Vieth v. Planet P. & F. Co., 64 Mo. App. 207. (4) If it should be held that a literal compliance with Revised Statutes, sec. 6262 and ordinance 1619 requires all owners to be notified, inasmuch as defendant is only asked to pay his proportion of the work, failure to notify the other joint owners is non-prejudicial and no defense. City of Marionville v. Henson, 65 Mo. App. 397; Shehan v. Owen, 82 Mo. 458; Cole v. Skrainka, 105 Mo. 303; Gibson v. Owen, 115 Mo. 258; (5) Party in possession is presumed to be the true owner until the contrary appears. Barry v. Otto, 56 Mo. 177; Craig v. Marshall, 15 Mo. 499; Keith v. Bingham, 100 Mo. 300; McIntosh v. Rankin, 134 Mo. 340.

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REYBURN, J.—This is an action by the city of Louisiana to recover the amount paid by it for construction of a granitoid sidewalk in front of a lot, whereon is erected a business house and also a dwelling, described as the east 60 feet of lot number 588 in block numbered 74, in the original town of Louisiana. In August, 1900, the city council of plaintiff enacted an ordinance requiring the owners of land adjoining this and other lots to construct new pavements, and in compliance with the statutory requirement, it caused notice to be served on such owners. Defendant had been in possession of the above property for many years, occupying the dwelling and in charge of the store building. During that time he had made the statutory return for assessment purposes, verified by his affidavit, the property had been assessed to him and he had paid the taxes thereon, and accordingly notice concerning the sidewalk in front of this property was served upon him as its presumed owner. After such service or notice he appeared before the city council and asked to be relieved of putting down the walk at that time, which was refused, but he remained silent regarding the true ownership of the lot. The council then passed further ordinances for letting the contract for the reconstruction, and the successful contractor performed the work and was paid therefor by plaintiff.

In the defense of defendant to the action of plaintiff upon the taxbill, his answer averred that he was an owner of only an undivided one-fourth interest and the reply reiterated that, if not sole owner, he was owner of such undivided interest.

The court found in favor of plaintiff but adjudged as owner of one-fourth interest, defendant should pay but the like proportion of the cost of reconstruction, and rendered a judgment accordingly, from which he has appealed.

The plaintiff operates under a special charter, and the work herein was performed under sections 6261 and

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6262 of R. S. 1899, and no special taxbill, which by statutory enactment creates a presumptive case, was issued. The industry of counsel as well as the investigation of the court have failed to unearth any direct authority upon the defense herein interposed, and especially the decisions of the appellate courts of this State seem devoid of any such question. The proceedings are confessedly regular, so far as defendant is concerned, except that he was treated as sole owner, while in truth he was possessed of an undivided fractional interest; but to the extent of his ownership, his share of the lot was benefited by the reconstruction, and no good reason has been suggested why he should be heard to complain that his co-owners were not notified of the contemplated improvement, or that the proceedings were such an entirety that being void and ineffectual as to those owners not receiving statutory notice, they should be held invalid as to him. This general doctrine has obtained recognition in analogous proceedings. Elliott on Roads (2 Ed.), sec. 318, intimates that "in such cases (*i. e.* failure to give notice to some of the property-owners) the better opinion is that the proceeding is void only as to those who have not been notified, but valid as to those who had notice." That a part owner may pay a special taxbill against the realty owned in common and maintain an action for contribution against his co-owners has been expressly held by this court. Granite Co. v. Taylor, 64 Mo. App. 37.

Again, under the facts peculiar to this case, the defendant might have been well held estopped from setting up the defense of part ownership of the lot affected. His course of conduct not only by remaining mute before the city council regarding the divided ownership, but in the returns made by him to the assessor, the permitting the property to be assessed to him as such owner and payment of taxes thereon as such, though the latter were suffered without any such intent or purpose on his part, were all calculated to mislead and mis-

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inform plaintiff as to the title of the realty. The judgment of the court threw on defendant no more than his proportion of the cost of the reconstruction and is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

COLUMBIA PAPER STOCK COMPANY, Respondent, v. FIDELITY & CASUALTY COMPANY OF NEW YORK, Appellant.

St. Louis Court of Appeals, January 19, 1904.

1. **INSURANCE: Employer's Liability Policy: Notice of Accident.** A stipulation in an "employer's liability" policy that the "assured, upon the occurrence of an accident, shall give immediate notice thereof, with the fullest information obtainable," to the assurer, is a reasonable requirement.

2. ———: ———: ———: **"Immediate Notice:" Reasonable Time.** Notice of an accident to the insurer given with diligence and in a reasonable time, due regard being had to the attending circumstances, is a legal compliance with the requirement for "immediate notice."

3. ———: ———: **Corporation: Notice to Agent.** The knowledge of a forewoman that an employee, who had previously worked under her, was sick and claimed that her illness was due to the infected material she was required to work with, was not notice of such claim to the employer, where the duties of such forewoman were to direct employees where and how to work, without power to engage or discharge them.

4. ———: **Construction of Policy.** The provisions of insurance policies are liberally construed in favor of the insured.

5. ———: ———: **Employer's Liability Policy: Accidental Injuries.** Kidney disease, contracted by an employee by handling infected rags for her employer, is an injury "accidentally suffered," within the terms of an employer's liability policy.

Appeal from St. Louis City Circuit Court.—*Hon. D. D. Fisher*, Judge.

AFFIRMED.

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Percy Werner for appellant.

(1) A disease produced by a known cause, as acute kidney disease or dropsy engendered by absorption of poison, resulting from exposure due to handling infected paper or rags, in the regular course of one's employment, is not a bodily injury accidentally suffered within the purview of the employer's policy in evidence in this case. Bacon v. United States & M. Acc. Assn., 123 N. Y. 304; 26 N. E. Rep. 399; Sinclair Admx. v. Maritime Passgr. Assn. Co., El. & El. 478; Dozier v. Fidelity & Casualty Co., 46 Fed. 446, 449. (2) The right of recovery upon a contract of employer's liability insurance does not pertain to all liability which as master assured may incur. The injury from the consequences of which he is thus protected must not only be one for which he is legally chargeable, but must also be covered by the provisions of the policy. 11 Am. & Eng. Ency. of Law (2 Ed.), 11. (3) A disease produced by a known cause can not be considered as accidental. Dozier v. Fidelity & Cas. Co., 46 Fed. 446, 449; Bliss on Ins., section 399; May on Ins. (3 Ed.), section 519. (4) A condition in an employer's liability insurance policy requiring that the assured shall give immediate notice to the insurance company upon the occurrence of an accident, is a condition precedent. Underwood Veneer Co. v. Lon. G. & A. Co., 75 N. W. (Wis.) 996; Travellers Ins. Co. v. Myers, 57 N. E. (Ohio) 458; National Const. Co. v. Travellers Ins. Co., 57 N. E. (Mass.) 350; Smith & Dove Co. v. Travellers Ins. Co., 50 N. E. (Mass.) 516; Green v. Northwestern Live Stock Ins. Co., 54 N. W. (Iowa) 349; Edwards v. Insurance Co., 75 Pa. St. 37; Victorian, etc., Co. v. Australian, etc., Co., 19 Victorian Law Reports 139; Wythe v. Manufacturers Acc. Co., 15 Canada L. I. 86; London G. & A. Co. v. Sinwy, 66 N. E. (Ind.) 481; Rooney v. Maryland Cas. Co., 67 N. E. (Mass.) 882; Ins. Co. v. Kyle, 11 Mo. 278, 289; McCullough v. Ins. Co., 113 Mo. 606; McFarland v.

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Assn., 124 Mo. 204. (5) Courts will not vary the stipulation of parties by introducing equities for the relief of the insured against their own negligence, especially where the court can not put the insurer in as good position as if the agreement had been performed. N. Y. Life Ins. Co. v. Stratham, 93 U. S. 24; Klein v. Ins. Co., 140 U. S. 88.

Judson & Green for respondent.

(1) The poisoning of Anna Nickel while employed upon respondent's premises by the handling of infected rags or wall paper containing arsenic, negligently placed before her by respondent for assortment, was a "bodily injury accidentally suffered" within the terms of the policy sued upon. (a) Because it comes fairly within the meaning and intent of those terms when construed in view of the obvious purpose for which the policy was issued to respondent. Lovelace v. Travelers Protective Association, 126 Mo. 104; Brown v. Passenger Assurance Co., 45 Mo. 221; Insurance Co. v. Melick, 65 Fed. 168; Isitt v. Passenger Assurance Co., 22 Q. B. Div. 504; Freeman v. Mercantile Accident Association, 155 Mass. 351; Western Commercial Travelers Ass'n v. Smith, 40 L. R. A. 653; McCarthy v. Travelers Ins. Co., 8 Biss. (U. S.) 362; Barry v. Accident Ins. Co., 131 U. S. 100; Peck v. Equitable Accident Association, 52 Hun (N. Y.) 225; Young v. Accident Association, 6 Mont. Sup. Ct. 4; May on Insurance, vol. 2 (4 Ed.), secs. 514-520. (b) Because, if there is any ambiguity in the language of the policy, it must be construed most strongly against the insurer, and it is presumed that if any exceptions as to appellant's liability had been intended they would have been expressly stated in the policy in appropriate language. Dezell v. Fidelity and Casualty Co., 75 S. W. 1102; American Surety Co. v. Pauley, 170 U. S. 145; May on Insurance, vol. 1 (4 Ed.), secs. 174, 175. (2) The respondent

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was not bound by the terms of the policy to give appellant notice of an "accident" until it had itself received notice or acquired knowledge thereof, and therefore the court did not err in giving respondent's instruction No. 4. McFarland v. Accident Assn., 124 Mo. 204; Trippe v. Provident Assn., 140 N. Y. 23; Hoffman v. Indemnity Co., 56 Mo. App. 301; Mandell v. Fidelity and Casualty Co., 49 N. E. (Mass.) 110; Woodman's Accident Assn. v. Byers, 55 L. R. A. 291 (Neb.); U. S. Ins. Co. v. Boykin, 12 Wallace 436; Odd Fellow's Assn. v. Earl, 16 C. C. A. 596; Anoka Lumber Co. v. Casualty Co., 30 L. R. A. (Minn.) 689. (a) Neither did it err in refusing appellant's instructions 5, 6, and 7, because all of appellant's said instructions declare, as a matter of law, that notice to respondent's forewoman, who merely directed the employees where and how to work, and who had no other duties and no power to employ or discharge any one, was notice to the respondent corporation. Donham v. Hahn, 127 Mo. 439; Hickman v. Green, 123 Mo. 165; Reinhard on Agency, sec. 358. (b) Because the question of actual notice, involving the extent of an agent's authority, and also the extent of his knowledge and the manner of acquiring the same, is a question of fact, and, therefore, the finding of the lower court upon that question will not be reviewed here. Eyerman v. Second National Bank, 13 Mo. App. 289; affirmed in 84 Mo. 408; Beattie v. Butler, 21 Mo. 323; Muldrow v. Robison, 58 Mo. 331; Hill v. Tissier, 15 Mo. App. 299.

STATEMENT.

The statement of facts submitted by appellant has been accepted by respondent, and, commending such practice, therefore, with slight modifications, is adopted in the decision of the case.

This is an appeal from a judgment against appellant on a claim arising under a so-called "employer's

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liability'' insurance policy. The petition, which recited the issuance and the substance of the policy, sets up that one of plaintiff's employees sued it in the circuit court of Jackson county, Missouri, for an alleged common law liability "for injuries suffered by her in said premises, to-wit, from accidental blood poisoning caused by contact with material used in plaintiff's business" and the recovery of a judgment by said employee of $1,650, the payment thereof by plaintiff and the refusal of defendant to indemnify plaintiff therefor. The contracting clause of the policy, which was filed with the petition, is an agreement to indemnify, under certain conditions, "against loss from common law or statutory liability on account of bodily injuries, fatal or non-fatal, accidentally suffered within the period of this policy by any person or persons while within the premises hereinafter mentioned." The only condition of the policy appealed to in defense of this action is that covered by number one of the general agreements embodied in the policy, which reads as follows:

"1. The assured upon the occurrence of an accident shall give immediate notice thereof with the fullest information obtainable at the time, to the home office of the company at New York city, or to its duly authorized local agent. He shall give like notice with full particulars of any claim that may be made on account of such accident, and shall at all times render to the company all co-operation and assistance in his power."

The answer admitted the issuance and delivery of the policy; admitted that plaintiff had been compelled to pay the said judgment, and that defendant refused to indemnify plaintiff therefor; denied that said judgment was recovered on account of accidental injuries as alleged, and set up as special defense the failure of the defendant to give immediate notice of the alleged accident, upon the happening thereof, or at any time prior

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to the institution of suit by the said employer. The reply denied the new matter set up in the answer.

Plaintiff after introducing the policy, introduced evidence tending to show that one of its servants, Anna Nickel, on May 30, 1900, made claim against plaintiff by instituting suit against it on account of bodily disease caused by the handling of infected rags, or of wall paper containing arsenic, in the ordinary course of defendant's business, the said Anna Nickel being at said time employed by it on its premises in Kansas City, and recovered judgment for $1,650 on said claim, which judgment was affirmed on appeal by the Kansas City Court of Appeals in June, 1902, and which with interest and costs amounted at the time of payment to $1,848.10. Plaintiff introduced the pleadings in the Nickel case, the petition which charged defendant (plaintiff herein), with negligence in delivering to plaintiff to be sorted and cleaned a bale of steaming hot material consisting of waste paper mixed with wall paper, and also a sack of waste paper, old bandages and rags, and pieces of decaying human flesh, all more or less impregnated with some poisonous drug or drugs made up from the cleaning of a hospital, and that she thereby was poisoned and made violently sick by coming in necessary personal contact with said material, and that Bright's disease and dropsy resulted therefrom, and her health became permanently broken down and ruined to her damage in the sum of five thousand dollars, for which the suit was brought. The answer set up that the injuries were the result of risks of the employment which plaintiff had assumed. Plaintiff also introduced in evidence the instructions given to the jury in the Nickel case; those for plaintiff told the jury that the employer was bound to use reasonable means to protect the health of his employees; that if they found her health had been injured through failure to use such means a recovery might be had for such injury to her health, and that plaintiff did not assume in such employ-

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ment any unknown peril to her health. Plaintiff likewise introduced in evidence the opinion of the Kansas City Court of Appeals, 95 Mo. App. 226.

Defendant introduced evidence tending to show that the bodily injury sustained by said Anna Nickel was acute kidney disease or dropsy engendered by absorption of poison resulting from exposure in handling infected rags or wall paper in the regular course of her employment, and without violent external injury of any kind, which disease had its apparent inception on April 14, 1900, in an attack of vomiting which was witnessed by the assistant forewoman of plaintiff under whom said Anna Nickel worked on the said premises, at which time the said Anna Nickel gave up her employment, and went home and no more returned to plaintiff's place of business; that on April 24th, 1900, the forewoman of plaintiff, under whom the said Anna Nickel worked for plaintiff, was notified that said Anna Nickel was ill, and that she claimed that her sickness was caused by handling infected paper and rags at defendant's place of business; that the duties of said forewoman were merely to direct employees where to work and how to do their work, and she had no power to engage or discharge employees; that plaintiff's chief office and place of business was at St. Louis, Missouri; that it did not notify defendant of the said injury to or illness of said Anna Nickel on said 24th day of April, or before that time, and that defendant was not notified of such occurrence until May 31, 1900, nor until after suit had been instituted by the said Mrs. Nickel to recover damages for the said injury.

Instructions in the form of propositions of law, (jury having been waived and trial had by the court sitting as a jury) were requested by both parties, and exceptions duly saved as indicated. The finding and judgment of the court was in favor of plaintiff for $1,935.85, and motion for a new trial duly filed was subsequently overruled and appeal perfected to this court.

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REYBURN, J. (after stating the facts as above).—1. The assignments of error presented by appellant are subdivided but the argument on its behalf may be reduced to two principal contentions. The first of the general agreements, as they are termed in the policy, stipulated that the assured upon the occurrence of an accident should give immediate notice thereof with the fullest information obtainable at the time, to the home office of appellant at New York, or its duly authorized agent, etc. It appeared in evidence that the chief office of respondent was in the city of St. Louis, with a subordinate office at Kansas City, where the event occurred, in charge of a general or assistant general manager, neither of whom knew of the illness of Anna Nickel until suit against respondent was brought by her May 31, 1900, in the Kansas City circuit court, which thereupon, without delay, notified appellant of the claim and action. It further appeared that Anna Nickel was suffering from acute kidney disease or dropsy occasioned by the absorption of virus in handling infected rags or poisonous wall paper, the first stage of which on April 14, 1900, developed in an attack of vomiting, in presence of the assistant forewoman of respondent, under whom Anna Nickel worked; at this the commencement of her illness the latter abandoned her employment and on April 24th, ensuing, this forewoman learned of the continued illness, and that the sufferer claimed her sickness had been produced by handling infected paper and rags at respondent's place of business. The duties of this forewoman were to direct employees where and how to work, but without power in her to engage or discharge them. The general manager and his assistant had general charge and superintendence of the business of respondent at Kansas City and alone were authorized to employ or discharge subordinates. Under this state of facts appellant insists that respondent failed to comply with the provision of the policy respecting notice. The demand of such notice under the qualifications pres-

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ently defined, is reasonable and it is material and important to the insurer; the purpose manifestly is to advise appellant promptly of the existence of any claim, putting it upon inquiry, and so afford it full opportunity to investigate the facts attending the occurrence and to enable it to adjust and pay the loss or prepare to resist it, as it may conclude just or expedient.

It may be conceded, as asserted by appellant, that in construing and giving effect to this and similarly worded provisions of like contracts, it has been declared by authority entitled to respect and consideration, that the giving of notice, alike when the accident occurred, and when the claim therefor was made, constituted a condition precedent, which the employer was bound to perform in order to maintain an action on the policy, even in the absence of a forfeiture clause therein, as in the case of Underwood Veneer Co. v. London etc. Co., 100 Wis. 378, where it was further held, after announcement of above principle, that a notice of claim for damages after claim for damages had been made, and first advanced nine months after the accident did not satisfy the requirement that immediate notice should be given of the occurrence of the accident, but the doctrine of this line of decisions is opposed to the weight of authority, and the sounder opposing conclusions reached in other states as well as in this State. As indicated by an eminent commentator on the law of insurance, to give the word "immediate" in such contracts a literal significance in most cases would deprive the insured of indemnity, and policies of insurance would be converted into instruments of fraud. May, Insurance, vol. 2, (4 Ed.), sec. 462.

In McFarland v. Accident Assn., 124 Mo. 218, the legal translation of the word "immediate" as applied to notice was directly considered and it was held that this term could not be construed literally, without, in many cases, causing a forfeiture and that it was frequently impossible under the circumstances of the ac-

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cident to give immediate notice, and that this and similar words should be construed to mean within a reasonable time. The decision continued: "So though the time in which the notice shall be given is fixed under the contract, if the circumstances of the accident are such as to make it impossible to comply with the condition, giving the notice within a reasonable time after it becomes possible, has been held sufficient." This language is adopted as expressive of the true rule in the well considered case of Woodmen etc. Assn. v. Byers, 62 Neb. 673.

Provisions of this description also affecting the action of the assured, subsequent to the event, the subject of indemnity and consequently after the loss, if any, has ensued, and the liability measurably attached, have received in this State a construction of the utmost liberality toward the beneficiary to obviate a forfeiture. Our conclusion, therefore, is that if no time is specified, or notice is required to be given immediately, notice given with diligence and in a reasonable time, due regard being had to the attending circumstances, is a legal compliance with such condition. McFarland v. Accident, etc., Assn., supra; Mandell v. Casualty Co., 170 Mass. 173; Dezell v. Casualty Co., 75 S. W. 1102; Hoffman v. Accident Co., 56 Mo. App. 301; Anoka, etc., Co. v. Casualty Co., 30 L. R. A. 689; Trippe v. Provident, etc., Society, 140 N. Y. 23. Nor can the knowledge of the assistant forewoman of respondent of the original attack of sickness of the sufferer, its continuance, and its assigned cause be imputed to respondent. Respondent as employer and principal would not be charged with any knowledge of or notice to its forewoman, unless such knowledge or notice was in respect to a matter within the scope of her duties in respondent's employ. It is obvious that so ordinary an occurrence as the illness and consequent absence of an employee imported no claim or liability under the policy, and it is equally apparent that the knowledge of the forewoman was not

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derived as the result or consequence of any notice sought to be given her by virtue of her service in respondent's employ or as its representative. Knowledge of those in the control and the conduct and superintendence of respondent's business at its premises at Kansas City, its general manager and assistant manager, if they had possessed the knowledge of the forewoman, especially that upon the continuation of her illness, Anna Nickel had claimed that her sickness was attributable to handling infected rags and poisonous paper in respondent's employ, might have been asserted to have been the knowledge of the respondent, but not such knowledge on the part of an assistant forewoman, an employee of power and authority proven to have been so limited. A corporate principal is affected with notice to its agents to the same extent and in the same manner as an individual, and can only be charged with notice of those facts in the knowledge of its agents, within the scope of the business entrusted to them. Donaham v. Hahn, 127 Mo. 439; Hickman v. Green, 123 Mo. 165.

2. Appellant further puts forward the contention that a disease produced by a known cause can not be accidental, and, therefore, such a disease as acute kidney disease or dropsy produced by the absorption of poison, consequent on handling infected paper or rags in the course of employment, is not covered by the policy and the legal question is thus sharply presented whether the injuries consequent on such illness resulted from a cause against which the insurance was issued. In the construction of such contracts it is well established, that not only should they be given a fair and reasonable construction so as to give effect to the objects intended by the parties thereto, but any obscurity in the language employed in the contract is to be resolved against the insurer and to receive a broad and liberal interpretation in favor of the assured. Again borrowing from the eminent authority on the law of in-

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surance above referred to; "No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling, than that which declares that in all cases, it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity, which in making the insurance, it was his object to secure. When the words are without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted. May, Insurance, vol. 1 (4 Ed.), sec. 174-5. This doctrine has obtained recognition and application in the recent decision by the Supreme Court of Missouri already adverted to, Dezell v. Casualty Co., supra, wherein it was in substance held that a policy insuring against bodily injuries sustained through external, violent and accidental means, but in terms not covering injuries fatal or otherwise, resulting from poison or anything accidentally taken, administered, absorbed or inhaled, did not bar recovery from unintentional death resulting from medicine, though containing poison administered, bona fide, to alleviate physical suffering. The rule of construction that an uncertainty respecting the meaning of terms of an insurance contract must be determined in favor of that interpretation favoring the assured, even though otherwise intended by the insurer, has received the sanction of this court. Hoffman v. Accident Co., supra; Hale v. Ins. Co., 46 Mo. App. 509; Laforce v. Ins. Co., 43 Mo. App. 530. See also American Surety Co. v. Pauley, 170 U. S. 133; Trippe v. Provident, etc., Soc., supra.

As further illustrative of the tendency of the courts, especially in this State, toward the direction suggested, in rendering and giving effect to the language adopted in contracts of indemnity against death or injury by causes asserted as accidental, in Lovelace v. Travellers Protective Assn., 126 Mo. 104, the Supreme Court in defining the term accident, after a lengthy revision of the various definitions offered by authori-

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tative lexicographers and accepted by appellate courts, held that death, resulting from an affray provoked by the deceased in an effort to eject an intruder from a hotel office, was death by accident within the language of the mortuary certificate involved. An extensive array of decisions in England, as well as in America, submitted by respondent tend to negative the proposition laboriously sought to be sustained by appellant, that a disease superinduced by a recognized cause is not to be considered accidental.

In Isitt v. The Railway Passengers Assurance Company, 22 Queen's Bench Division 504, the court held that where pneumonia supervened with fatal effect, as result of a cold, where deceased had fallen and dislocated his shoulder and his catching cold and its fatal results were attributable to the condition of health to which he had been reduced by the accident, the death of the assured was due to the effects of the injury caused by accident within the meaning of the policy.

In Travellers Ins. Co. v. Melick, 65 Fed. Rep. 178, the Federal Circuit Court of Appeals, Eighth Circuit, decided that where the insured accidentally inflicted a gun shot wound on himself which produced lockjaw, and eighteen days thereafter he was found with his throat cut and a scalpel in hand, having also been in the throes of tetanic spasms causing intense agony, the question of the proximate cause of his death was for the jury although the language of the policy insured against death, that should result from bodily injuries effected through external, violent and accidental means, alone, independent of all other causes and should not cover death by suicide, sane or insane.

In Peck v. Equitable, etc., Assn., 52 Hun (59 N. Y.) 255, the Supreme Court of New York held that death from embolism or thrombus, which evidence in the case inclined to prove as resulting from a broken arm, was within the terms of a policy covering injuries effected through external, violent and accidental means.

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In Freeman v. Mercantile, etc., Assn., 156 Mass. 351, the Supreme Judicial Court of Massachusetts adjudged that peritonitis ensuing fatally from a fall, was embraced in the scope of a policy against bodily injuries effected through external, violent and accidental means, and that the ruling establishing such a significance was in accordance with the apparent purpose and intention of the parties, and made the contract a beneficent provision for the beneficiaries therein named.

In McCarthy v. Travellers, etc., Co., 8 Bissell 362, the United States Circuit Court, Eastern Division of Wisconsin, held that death from rupture of a blood vessel sustained while exercising when the lungs of the deceased were in weak and diseased condition, warranted recovery under a policy restricted to injuries through external, violent or accidental means, and not extending to any bodily injury of which there should be no external or visible sign, nor to any injury happening directly or indirectly in consequence of disease.

In U. S., etc., Assn. v. Barry, 131 U. S. 100, the Federal Supreme Court decided that death from inflammation or stricture of the duodenum, resultant from a jump or downward step might properly be an accident effected through external violence and accidental means, although the benefits of the insurance should not extend to any injury of which there was no external and visible sign, nor to any injury happening directly or indirectly in consequence of disease.

In Young v. Accident, etc., Co., 6 Montreal Law Rep. 3, the Superior Court of Montreal declared that death from erysipelas consequent on a fall and bruising of right leg of assured was embraced within the language of a policy indemnifying against bodily injuries effected through external, accidental and violent means.

In Martin v. Travellers, etc., Co., 1 Foster & F. 505, the policy protected against any bodily injury resulting from any accident or violence, provided that the injury should be occasioned by any external or material cause

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operating on the person of the insured and a recovery was sustained where in lifting a heavy burden, the spine was injured.

In North America, etc., Co. v. Burroughs, 69 Pa. St. 43, the policy insured against death in consequence of an accident in case death was caused solely by an accidental injury and the court held that an accidental strain terminating fatally was within the meaning of the policy.

Finally in the case of Fetter v. Fidelity, etc., Co., 174 Mo. 256, the Supreme Court of this State has declared that where the deceased, in a policy to compensate for death, independent of all other causes, by accidental means in attempting to close a widow fell against a chair, causing a rupture of a kidney, from which rupture ensued a hemorrhage causing death, it was properly for the jury to decide whether the cancerous condition resulted from the rupture or whether the rupture would not have occurred had there not been a weakened cancerous condition pre-existing.

Appellant has invoked and appealed to several cases as upholding the doctrine contended for, that a disease produced by a known cause can not be a bodily injury accidentally suffered and therefore in conflict with the foregoing authorities.

In the case of Bacon v. U. S., etc., Assn., 123 N. Y. 304, the Court of Appeals of New York, two of the judges dissenting, held that the deceased did not die from any accident within the range of the policy, but came to his death by disease within the provision of immunity of the contract from death caused wholly or in part by bodily infirmities or disease existing prior or subsequent to date of mortuary benefit certificate, when it was conceded the assured died from a malignant pustule produced by contact with putrid animal matter, and which was denominated by the deciding judge as plainly a disease as smallpox or typhoid fever; and the policy in this case is distinguishable from the case

before us as excepting liability from any bodily injury happening directly or indirectly in consequence of disease or death caused by disease.

In Dozier v. Fidelity, etc., Co., 46 Fed. Rep. 446, the United States Circuit Court of the Western Division of Missouri, after assenting to the proposition that a disease produced by a known cause could not be considered as accidental, merely decided that sun prostration, *i. e.* commonly called sun-stroke, incurred by decedent in the current course of his business, was not embraced in bounds of a contract of assurance against bodily injuries sustained through external, violent and accidental means and excluding any disease or bodily infirmity.

In Sinclair v. Maritime, etc., Co., 3 Ellis & Ellis 478, the Court of Queen's Bench merely held that the term accident necessarily involved some violence, casualty or *vis major,* and that death from sun-stroke must be considered to have arisen from a natural cause and not from accident happening to deceased upon any ocean, sea, river, or lake within the legal meaning of the policy.

In Southard v. Railways, etc., Co., 34 Conn. 574, it was held under a policy against death by violent and accidental means, that a death though violent must be accidental as well, and the contract in terms embraced only cases where the elements of force and accident concurred in effecting the injury and that injury to an insured injured internally by jumping from a railroad and running a considerable distance was not caused by accidental means.

In Feder v. Iowa, etc., Assn., 107 Iowa 538, the death of an insured was considered not accidental by the Supreme Court, consequent on rupture of an artery in reaching to close a window.

In so far as these latter cases are opposed to the rulings hereinbefore relied on, we must dissent from

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such conclusions and adhere to what we deem the sounder reasoning and weight of authority.

If, for example, in lieu of producing the more gradual and protracted infirmities of acute kidney disease or dropsical affection, the infected material submitted to defendant's workwoman had emitted poisonous gases or fumes producing her instantaneous death, or resulting in immediate and violent convulsions, under numberless authorities the occurrence would, in legal contemplation and within the interpretation of policies insuring against accidents, be confidently pronounced accidental, yet such consequences would be disease produced by known causes.

In conclusion after full consideration, upon a fair and legal construction of the terms of this policy, which were for indemnity against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered, the injury sustained by respondent's employee upon its premises in handling the infected rags and wall paper fell fairly within the true meaning and intent; the judgment below was rendered for the right party and is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

FRANK LEITNER, by next friend, Respondent, v. LOUIS GRIEB, Appellant.

Kansas City Court of Appeals, November 9, 1903.

1. **MASTER AND SERVANT: Leaving Service: Assumption of Risk: Tools.** The rule that a servant is not required to quit the service because the master has failed to furnish safe appliances and that by remaining in the service he does not waive his right to recover for injuries if he has reasonable ground to believe he can safely use the appliances furnished by the exercise of proper care, has no application to the facts of this case.

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2. ——: ——: ——: ——: **Ability to Perform Work: Inexperience.** Where the master directs his servant to perform certain work and the servant objects because the work is beyond his power, and thereupon the master tells him to either do the work or quit the service, and injuries result from the servant's inability to do the work, the master is not liable; nor is he liable where he can not reasonably anticipate and guard against the danger by the exercise of proper care; nor under the facts in this case does the youth and inexperience of the servant fix the liability on the master.

Appeal from Jackson Circuit Court.—*Hon. E. P. Gates*, Judge.

REVERSED.

Harkless, O'Grady & Crysler for appellant.

The plaintiff, under the undisputed evidence, was not entitled to recover and the court should have given a peremptory instruction to return a verdict for defendant, and also instruction No. 2 asked by defendant. Harff v. Green, 67 S. W. 576 (not reported); Lampson v. American Ax Co., 58 N. E. 585, 177 Mass. 144; Worlds v. Railroad, 52 S. E. 646, 99 Ga. 283.

Kagy & Horn for respondent.

Filed an extended argument.

BROADDUS, J.—This suit is for damages alleged to have been sustained by reason of an injury caused by the negligence of defendant. The answer was a general denial and allegations of contributory negligence on the part of plaintiff and assumption by him of the risk. The facts given in evidence to support plaintiff's cause of action briefly stated are as follows:

Plaintiff at the time of the injury was a young man about eighteen years of age in the employ of defendant and had been for a while previous to his alleged injury engaged in handling stone; at the time of his said injury

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he and another workman by the name of Smith were required by defendant to remove a large stone to a trench which had been dug for a foundation which defendant with his laborers were then engaged in building; both plaintiff and said Smith suggested to defendant that on account of the great size of said stone they ought to have another man to assist them; that defendant told them to roll the stone into the ditch; that if they could not, "to leave the job"—or words substantially of the same import; thereupon plaintiff and Smith placed the crowbars which they had for the purpose under the stone and endeavored by raising the ends in their hands to move the stone as required; the stone was lying on some loose earth on account of which either plaintiff's bar or the rock slipped; plaintiff had the end of the bar over his shoulder and when the bar or rock so slipped the additional weight thus caused to be thrown upon it caused the said bar to slide down on plaintiff's arm, whereby he was severely injured. There was also evidence that prior to the occasion named a derrick had been used in handling stone, which, however, was not then in a condition to be utilized.

The only question presented is, whether under the proof and the pleadings the plaintiff is entitled to recover?

It is the contention of the plaintiff that the rule of law applies to this case, viz.: That a servant is not obliged to quit the service of his master because he has failed to furnish safe appliances or tools for the performance of his labor or a safe place in which to perform it, and that by so remaining in his master's employment he does not waive his right to recover for injuries received in consequence of a failure of duty in that respect upon the part of the master if he has reasonable grounds to believe that he can safely use such appliances or tools, or safely labor in the place furnished by the master, by the exercise of proper care.

But the facts in proof do not show that either the

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crowbar used by the plaintiff or the place where he was engaged at labor was unsafe at the time of his injury. It was not from any apprehension of danger that he and his fellow-workman, Smith, suggested to the defendant that they ought to have another man to help move the stone, but it clearly appears that their demand for additional help was because they believed that they were not strong enough to move the stone into the trench. The injury to the plaintiff was not the result of any apprehended danger but of the effort upon the part of plaintiff and his fellow-workman to accomplish that which was beyond a reasonable exertion of their powers. The cases cited have no application to the facts of this case as neither the safety of the crowbar used nor the place in question had anything to do with plaintiff's injury. The question is therefore one of principle and not of precedent. It is like this: The master directs his servant to perform a certain service; the servant objects because he thinks it beyond his power to perform it alone and unaided, or that he ought to have assistance in the work; the master tells him if he does not choose to undertake it, to quit his service. The servant does, however, attempt to perform the service and is injured, not by reason of any defect in the tools or appliances, or the place furnished for the servant, but because he has undertaken that which he knows is beyond the reasonable exercise of his power. And furthermore, we know of no rule of law that holds the master liable in damage for an injury to his servant that can not reasonably be anticipated and guarded against by the exercise of proper care. Here, the servant assumed the risk. To hold otherwise would be holding that the master is an insurer of the safety of his servant while in his employ. The plaintiff, however, insists that as he was of tender years the defendant was required to exercise a higher degree of care than would have been required of him if he had been a person of mature years and sound dis-

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cretion. But the evidence shows that plaintiff was fully seventeen years of age and that he had had some experience at the kind of labor in which he was engaged when injured, and there was nothing to show but that he was as fully aware of the character of the undertaking as was his fellow-workman, Smith.

For the reasons given we do not think the plaintiff was authorized to recover, therefore, the cause is reversed. All concur.

CRANE COMPANY, Appellant, v. S. M. NEEL et al., Respondents.

Kansas City Court of Appeals, November 23, 1903.

1. **MECHANICS' LIENS: Evidence: Contractor's Declarations.** The declarations of a contractor that materials were purchased for appellant's building, although made when they were obtained, are not evidence against the landowner, since they do not show that the sale was made upon the credit of the building where the material was used.

2. **EVIDENCE: Depositions: Exhibits: Statute.** The statute requires all exhibits proved or referred to to be inclosed, sealed up and directed to the clerk of the court where the action is pending, and exhibits not so treated are inadmissible in evidence.

3. **——: ——: ——: Court's Discretion.** A party may withdraw his depositions and have exhibits properly attached, but this must be done before the trial, and to permit it at the trial is within the sound discreton of the court.

4. **MECHANICS' LIENS: Materialman: Credit of the Building: Proof.** A materialman must prove that he sold the materials on the credit of the building or no lien attaches.

5. **——: ——: ——: Evidence.** The fact of selling on such credit may be proved by any circumstance which tends to show his purpose, and the declarations of the contractor that he bought for the building has no tendency to prove that the ma-

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terialman sold therefor; but the act of the materialman in response thereto is evidence which the declaration explains. Deardorff v. Eberhartt, 74 Mo. 37, is believed not to conflict with this view.

6. ——: ——: ——: ——. Proof of the contractor's purpose is not proof of the materialman's purpose, and a contractor's declaration that the material is to go into a certain building is inadmissible to support the lien unless followed by proof of the materialman's immediate compliance with the declaration.

Appeal from Jackson Circuit Court.—*Hon. James Gibson,* Judge.

AFFIRMED.

Grant I. Rosenzweig for appellant.

(1) Statutes of mechanic's lien should be liberally construed. O'Shea v. O'Shea, 91 Mo. App. 231; Southern v. Rolla, 75 Mo. App. 629. (2) Faurot's evidence that it was part of his purchase that these goods were for the Neel residence was admissible. The first notice the owner is required to have is that provided by statute. Henry v. Evans, 97 Mo. 47. (3) No mechanic's lien can be sustained unless it be shown that the material was bought for the building. Lumber v. Lumber, 72 Mo. App. 261; Schulenberg v. Johnson, 38 Mo. App. 404; Fathman v. Ritter, 33 Mo. App. 407. (4) The sheet from the book of original entry was admissible and was of great importance both as to the items which appellant delivered and as to the sale being for the building. Borges v. Bette, 142 Mo. 572; Anchor v. Walsh, 108 Mo. 277; Smith v. Beattie, 57 Mo. 282; Robinson v. Smith, 111 Mo. 205; Seligman v. Rogers, 113 Mo. 642; Kaufman v. Christophel, 59 Mo. App. 83; Western v. Boice, 74 Mo. App. 353. (5) Faurot's statement as to the purchase being for the building was not improper declaration within the meaning of 74 Mo. 37. Crothers v. Acock, 43 Mo. App. 320; City v. Fisher, 61 Mo. App.

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510; Carthage v. Barman, 55 Mo. App. 212; Stove v. Spear, 65 Mo. App. 91; Cahill v. Elliott, 54 Mo. App. 387; Western v. Buckner, 80 Mo. App. 98; House v. Terril, 37 Mo. 578; Lumber v. Lumber, 72 Mo. App. 261; Fathman v. Ritter, 33 Mo. App. 407; Schulenberg v. Johnson, 38 Mo. App. 404. (6) Appellant's exhibit was not disqualified because not attached to the deposition. In any event a fair discretion would have permitted him to attach the same. Ludy's testimony qualified the same. Stoddard v. Hill, 38 S. C. 390; Statutes like section 2309 are directory and not mandatory. Copenny v. City, 57 Mo. 88; City v. Foster, 52 Mo. 513; State v. Jennings, 98 Mo. 493; City v. Noue, 44 Mo. 136; State v. Hannibal, 113 Mo. 297; Hicks v. Chouteau, 12 Mo. 341; Young v. Camden, 19 Mo. 309; Choate v. Noble, 31 Mo. 341; Crawford v. Greenleaf, 48 Mo. App. 590; Scarritt v. Jackson, 89 Mo. App. 585; Webb v. Metropolitan, 89 Mo. App. 611; Lackland v. Walker, 151 Mo. 262; Bank v. Graham, 147 Mo. 256; Bank v. Hofman, 74 Mo. App. 208; Heman v. McNamara, 77 Mo. App. 1. Examples requiring papers to be filed. Wolf v. Brown, 142 Mo. 617; Bick v. Wilkerson, 62 Mo. App. 31; Nelson v. Betts, 30 Mo. App. 13; Jackson v. County, 41 Mo. 247; State v. Muir, 20 Mo. 303; Loan v. Brown, 59 Mo. App. 466; Edwards v. Brown, 67 Mo. 379; Governor v. Rector, 1 Mo. 638. Notes shall be filed with the petition. Rothschild v. Lynch, 76 Mo. App. 346. (7) It is the duty of the trial court to allow amendments unless defendant is misled or surprised. McMurry v. Martin, 26 Mo. App. 438; Wetzel v. Griffith, 41 Mo. App. 509; Riddle v. Aiken, 29 Mo. 453; Anderson v. Hance, 49 Mo. 161; Coony v. Murdock, 54 Mo. 351; Christie v. Railway, 94 Mo. 456; Hannibal v. Knudson, 62 Mo. 569. As to depositions: Doan v. Glenn, 88 U. S. 33; Howard v. Stilwell, 139 U. S. 199; Nix v. Rector, 4 Ark. 275; Hatfield v. Perry, 4 Harr. (Del.) 464; Edleman v. Byers, 75 Ill. 369; Petriken v. Collier, 7 W. S. Pa. 392; Hobart v. Mc-

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Coy, 3 Pa. St. 422; Wright v. Cabbot, 89 N. Y. 578; Shea v. Mabry, 1 Lea (Tenn.) 329; American v. Mayne, 9 Utah 321; Tyrell v. Cairo, 7 Mo. App. 300; Boeden v. Barber, 81 Mo. 636; Little v. Brubaker, 89 Mo. App. 1; Hoyberg v. Hanske, 153 Mo. 73; Deame v. Green, 31 Mo. App. 270; Holman v. Bachus, 73 Mo. 49; Laswell v. Presbyterian, 46 Mo. 282; Finley v. West, 51 Mo. App. 569.

Ellison A. Neel and *Edward C. Wright* for respondents.

(1) Faurot's statements to the plaintiff company that the goods were purchased for the Neel house were properly excluded as hearsay and not binding upon the owners. Deardorff v. Everhartt, 74 Mo. 37; Schulenberg v. Hawley, 6 Mo. App. 34; Grace v. Nesbitt, 109 Mo. 9; Current River Co. v. Cravens, 54 Mo. App. 216. (2) The exhibits referred to in Seymour's deposition and his testimony as to their contents were properly excluded as against defendant Neel. Crary v. Carradine, 4 Ark. 216; Augusta Co. v. Randall, 85 Ga. 297, 11 S. E. 706; R. S. 1899, sec. 2903; McCartney v. Buck, 8 Houst. (Del.) 34, 12 Atl. 717; Little v. Wyatt, 14 N. H. 23; Palmer v. Goldsmith, 15 Ill. App. 544; Gage v. McIlwain, 1 Strob. (S. C.) 135; Woodes v. Dennett, 12 N. H. 51; Batchelder v. Sanborn, 22 N. H. 321; Mercier v. Copelan, 73 Ga. 636; Sloan v. McDowell, 75 N. C. 29; Sanford v. Miller, 19 Ill. App. 536; Gorman v. Montgomery, 83 Mass. (1 All.) 416; Kaiser v. Alexander, 144 Mass. 71; 12 N. E. 209; Somers v. Wright, 114 Mass. 171; Brown v. George, 17 N. H. 128; Keith v. Kibbe, 64 Mass. (10 Cush.) 35; Watrous v. Cunningham, 71 Cal. 30, 11 Pac. 811; Neville v. Northcutt, 47 Tenn. (7 Cold.) 294; Godfrey v. Codman, 32 Me. 162; Adkinson v. Simmons, 33 N. C. 416; Thompson v. Porter, 4 Strob. Eq. 58; Ridd v. Robinson, 126 N. Y. 113. (3) The court below committed no error

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and under the evidence introduced could have done no other than he did. Lumber Co. v. Lumber Co., 72 Mo. App. 248, 261; Schulenburg v. Johnson, 38 Mo. App. 404; Cahill v. Elliott, 54 Mo. App. 387; Fathman v. Ritter, 33 Mo. App. 404; Grace v. Nesbitt, 109 Mo. 9; Hydraulic Co. v. Zippenfield, 9 Mo. App. 595; Simmons v. Carrier, 60 Mo. 581; Schulenburg v. Prairie Home, 65 Mo. 295; Current River Co. v. Cravens, 54 Mo. App. 220; Reitz v. Ghio, 47 Mo. App. 287; Kirtley v. Morris, 43 Mo. App. 144, 151; Rand v. Grubbs, 26 Mo. App. 591; Christopher v. White, 42 Mo. App. 428.

BROADDUS, J.—This is a proceeding to enforce a mechanic's lien. The plaintiff is a dealer in plumbing supplies. The defendant Neel made a contract with his co-defendant, the Faurot Company, a manufacturing concern, to construct in his building hot water heating appliances, including radiators. It is claimed that said Faurot Company bought the radiators that were used in the construction of said heating appliances from the plaintiff. Defendant Neel's answer was a general denial.

On the trial plaintiff sought to prove that the articles in question were sold by the plaintiff to the Faurot Manufacturing Company, aforesaid, for the purpose of being used in the defendant Neel's building, and for that purpose introduced Mr. Faurot, one of the members of the defendant company, who testified by deposition. In his deposition he made the following statement: "I went to the Crane Company with a list of the materials to be used in the construction of the heating plant in Dr. Neel's residence and stated to the Crane Company that that material was for use in the Neel residence and that they would receive their pay on completion of the work." On motion of defendant Neel, the following part of said statement was struck out of the record so far as it affected him, to-wit: "And stated to the Crane Company that that material was for use in the Neel residence and that they would receive

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their pay on completion of the work." The plaintiff also introduced the deposition of Andrew Seymour who was the plaintiff's bookkeeper at the time the articles in controversy were sold. In said deposition the witness referred to a certain entry in plaintiff's book which contained the original order for the articles in dispute. This paper was identified as "Exhibit A," but was not attached to the deposition, being sent under seal to the clerk of the circuit court. The notary was in court and plaintiff offered to withdraw the deposition and have the said item attached to it by him but the court refused the offer and excluded the exhibit. It was shown that it was the habit among the lawyers practicing in the Kansas City courts to withhold exhibits and produce them on the trial. There was other evidence introduced but plaintiff frankly admits that without that which the court excluded he was not entitled to recover. The court peremptorily instructed the jury to find for defendants. Plaintiff assigns as error the action of the court in excluding said evidence.

In Deardorff v. Everhartt, 74 Mo. 37, it was held: "The declarations of the contractor that the materials were purchased for appellant's building, although made when they were obtained, are not evidence against the owners of the land." And a different ruling made in Morrison v. Hancock, 40 Mo. 564, was overruled. While plaintiff insists that the ruling in the former case is not good law it would not apply to this for the reason that here the contractor was testifying to his own declarations, which would prevent the application of said rule. But we can not see how that fact could make any difference as the reason for the rule is that the contractor not being the agent of the owner of the building is not authorized to bind such owner by his declarations. The rule is also recognized in Grace v. Nesbitt, 109 Mo. 9. But it is suggested that the rule only had reference to its incompetency as evidence that the material was used in the construction of the building sought to be charged

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with the lien, but that it is competent evidence to prove that plaintiff sold the material to be used in such building. In other words, that the sale was made upon the credit of the building. We do not see how this can be so. The plaintiff may have sold the material to the contractor without any intention of looking to the building as security for the price of the material, and the mere fact that plaintiff knew that the material was to be used in defendant's building was no evidence in itself that it so sold it to be so used. And the fact, if it was a fact, that plaintiff delivered a part of the material on the premises sought to be charged with the lien is also of itself no evidence that it was so sold. The plaintiff may have, for aught that appears in the record, sold the material in question without reference to any particular place where it might be used, as materialmen sometimes do where the financial standing of the contractor appears to be a sufficient guarantee for the price of the materials; or, in other words, where the sole credit is given to the contractor. And such seems to have been the case here according to the evidence of the defendant Neel who testified that before he paid the contractor for the material in question a member of the plaintiff's firm informed him that it had not sold to Faurot Company the material to be used in his house and that Faurot informed him that he was buying all his material from plaintiff without any reference as to where it was to be utilized.

The action of the court in excluding "Exhibit A" aforesaid is also approved. Section 2903, Revised Statutes 1899 requires: "All exhibits produced to the person (taking the deposition) and proved or referred to by a witness shall be inclosed, sealed up and directed to the clerk of the court in which . . . the action is pending." But plaintiff contends that said section is only directory and not mandatory. We think otherwise. And it is not perceived how the evidence of a witness and an exhibit, *the identification of which* de-

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pends upon the witness, can be admitted in the form of a deposition without a compliance with the statute. It was competent, with the permission of the court, for the plaintiff to have withdrawn the deposition and attach said exhibit. But this should have been done before the trial, at which time, judging from what the court said, it would have been permitted. But it was a question of discretion in the court which we think was soundly exercised. With the evidence excluded the plaintiff failed to show that the articles were sold to be used in defendant's building and he was not therefore entitled to a judgment enforcing his lien on the property.

There are other questions raised on the appeal but in view of the foregoing conclusions they are not deemed important and will not be considered.

The cause is affirmed. *Smith, P. J.*, concurs in result. *Ellison, J.*, concurs in result in separate opinion.

SEPARATE CONCURRING OPINION.

ELLISON, J.—In order to establish a mechanic's lien by a materialman for purchases by the contractor, it is necessary to prove, among other things, that the material was sold by the materialman for the owner's building. If the materialman does not sell the material for the building, he can not have a lien; for the law will not cast a lien upon him without his having any part or agency in its inception. He may never have seen the building and may not know its location, but he must sell the material for it. The language of the statute is that he must furnish the material "for" the building.

The proof of the fact that he did sell for the building may be made like proof of any other fact, *i. e.*, by anything which tends to show such was his purpose. The declaration of the contractor that he bought for the building certainly does not tend to prove that the materialman sold for it. For the contractor may pur-

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chase for a certain building and yet the seller have no knowledge whatever of the purpose of the purchase. But if the declaration of the contractor was made to the materialman and was connected by proof that the latter acted upon it by selling the material to him, it is good evidence that he sold for the purpose then declared. In such case the declaration of the contractor alone is not evidence, but the *act* of the materialman *in response* thereto is evidence. The declaration only explains the act which is the substantive thing. I believe the Deardorff case ought not to be regarded as opposed to this view.

In this case the evidence refused by the court was that the contractor went to plaintiff and stated "that the material was for use in the Neel residence." But the object in proving this declaration of the contractor was stated to the court to be to show "that the material was bought at the time by the Faurot Company for use in the Neel residence." That being its purpose, it was properly excluded: for proof of the contractor's purpose was not proof of the seller's purpose. If the object had been to prove the seller's intention and the offer of proof of the declaration had been followed by proof of the seller's immediate compliance therewith, it would have been competent as tending to show the seller's intention. But it was not offered for that purpose and was not connected in that way. It was therefore the mere independent declaration of the contractor which could not affect the owner.

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CONNERSVILLE BUGGY COMPANY, Respondent, v. FRED D. LOWRY, Defendant; EDWARD T. SMITH, Interpleader, Appellant.

Kansas City Court of Appeals, March 2, and December 7, 1903.

1. **MORTGAGE: Extension of Payment: Possession.** An extension of time for the payment of a debt does not postpone the mortgagee's right to the possession of the mortgaged property for failure to pay at the time originally agreed on.

2. **ATTACHMENT: Mortgage: Interplea.** A mortgagor interpleading in an attachment suit against his mortgagee claiming the attached property on the ground that the time of payment of the debt has been extended, must fail since he has no right to the possession of the mortgaged and attached property after the time originally set for the payment of the debt.

3. ———: ———: ———: **Evidence.** And such interpleading mortgagor can not show that another than the mortgagee has become owner of the debt, since he must recover on the strength of his own title and not on the weakness of his adversary's.

4. ———: ———: ———: ———: **Extension of Payment.** (Ellison, J., concurring.) Where a mortgage does not contain au agreement for the extension of the mortgage itself alleged to have been made some time before it was executed, but did contain a provision for immediate possession on default, the prior oral agreement is of no avail.

Appeal from Jackson Circuit Court.—*Hon. J. H. Slover*, Judge.

AFFIRMED.

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Jas. C. Rieger for appellant.

(1) The agreement made between Smith and Lowrey, before the maturity of the first installment of the note, was a valid one and fixed the maturity of the note on May 15, 1901, instead of March 1, 1900. The note had not matured and the mortgagee was not entitled to the possession of the property when the attachment suit was brought, September 14, 1900. Hence his creditors could not reach the property by attachment. Hardware Co. v. Hardware Co., 75 Mo. App. 522. (2) It has been repeatedly ruled in this State, where a debt secured by a mortgage is not due at the time of the commencement of the suit, that no forfeiture has accrued and that the mortgagee is not entitled to the immediate possession of the mortgaged property. Berger v. Longenberg, 42 Mo. App. 7; Hickman v. Dill, 32 Mo. App. 509; Chandler v. West, 37 Mo. App. 631; State v. Carroll, 24 Mo. App. 361; Bank v. Metcalf, 29 Mo. App. 384; Shoble v. Curde, 56 Mo. 487; Barnett v. Timberlake, 57 Mo. 499. (3) The property was not subject to attachment by a creditor of the mortgagee even though the note had matured and there had been a default in its payment. Am. and Eng. Ency. of Law (2 Ed.), vol. 11, p. 625. (4) Smith's interest in the property was sufficient to maintain an interplea. Boettger v. Roehling, 74 Mo. App. 257. (5) The mortgagor of a chattel, who remains in possession with the consent of the mortgagee after condition broken, may maintain trover against a third person who has wrongfully converted it. Buddington v. Mastbrook, 17 Mo. App. 577. (6) It was competent for the interpleader to show that the legal title to the property taken under the writ of attachment had passed from Lowry to Shellenberger by the transfer of the note, and as between the interpleader and Shellenberger he would not be the absolute owner, but as between himself and the party to the suit he was the owner of the property attached. Wear v. Sanger, 91 Mo. 348.

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Chas. B. Adams and *Metcalf & Brady* for respondent.

(1) The rights of the parties must be determined by the terms of the mortgage. The mortgage was not delivered and did not become a contract between the parties until March 6, 1900. The alleged extension of the mortgage debt was made on February 4, 1900. The alleged agreement about possession was made on the same day. It is a well-settled proposition of law that an oral agreement inconsistent with a subsequent written agreement pertaining to the same matters is superseded by the latter, and the rights of the parties will be measured by the written contract. Tuggles v. Callison, 143 Mo. 527; New England L. & T. Co. v. Workman, 71 Mo. App. 275; Parker v. Van Hoover, 142 Mo. 621. (2) The mortgage provides that upon default in payment of the note or any part of it, the mortgagee may take possession. Can a prior parol agreement be permitted to overcome the express terms of the mortgage? (3) At the time of the levy of the writ of attachment the conditions of the mortgage had been broken, and there had been no extension of the mortgage. The mortgagee was therefore the owner, and entitled to the immediate and exclusive possession of the mortgaged property. Robinson v. Campbell, 8 Mo. 365; Bowens v. Benson, 57 Mo. 26; Baldridge v. Dawson, 39 Mo. App. 532; Jackson v. Cunningham, 28 Mo. App. 354; Holmes v. Commission Co., 81 Mo. App. 102. (4) The extension of the mortgage debt, in the absence of a valid extension of the mortgage itself, can not affect the right of the mortgagee to the immediate and exclusive possession of the mortgaged property, after a breach of condition. Bowens v. Benson, 57 Mo. 26; Baldridge v. Dawson, 39 Mo. App. 527. (5) It being conclusively established by the interpleader's evidence that he was not the owner, and not entitled to the immediate and exclusive possession, of the property claimed, he failed

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to make a prima facie case which entitled him to go to the jury. Hardware Co. v. Hardware Co., 75 Mo. App. l. c. 521; Sawyer v. Mangan, 60 Mo. App. 78. (6) The court properly sustained the respondent's objections to the evidence regarding the transfer of the note secured by the mortgage to Shellenberger. This evidence was clearly inadmissible and irrelevant to the issues of this interplea. The interpleader must recover upon the strength of his own title and not upon the weakness of his adversary's. Car Company v. Barnard, 139 Mo. l. c. 145.

BROADDUS, J.—The original proceeding was by attachment against defendant Lowry in which certain personal property was attached as the property of said defendant then in the hands of the appellant Smith, who filed an interplea in which he claimed that he was the owner of such property. At the conclusion of the trial the court instructed the jury to find for the plaintiff company. The interpleader appealed.

The facts were, that on the sixth day of March, 1900, the interpleader acknowledged a chattel mortgage to secure a note payable to defendant Lowry in the sum of $800, payable in eight monthly installments of $100 each, bearing six per cent interest from date. One of the conditions of said mortgage was that in default of payment of said note, or in default of payment of any of said installments when due, then the whole became due and the said Lowry or his successor was authorized to enter upon the premises where said property might be found, and take possession of and sell the same, and apply the proceeds to the payment of the note. Notwithstanding said mortgage was dated the sixth day of March it was in fact of the date of the eighteenth of January, 1900, as was also said note.

The interpleader introduced evidence tending to show that the note by agreement was extended on February 4, 1900, to May 15, 1901. He also offered evi-

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dence to show that said note had been transferred to one Shellenberger, which upon objection by the plaintiff the court excluded.

It was held in Bowens v. Benson, 57 Mo. 26, that an agreement for the extension of the time for the payment of the debt did not postpone the mortgagee's right to the possession of the mortgaged property for failure to pay the debt at the time originally agreed on. See also Baldridge v. Dawson, 39 Mo. App. 527.

It therefore follows that as the mortgagee was entitled to the possession of the property under the terms of the mortgage, the debt being due and unpaid, the interpleader did not have the right to the immediate and exclusive possession thereof. It is well established law that in order to recover the possession of personal property, the claimant must show that he has general or special rights in such property, and the right to the immediate and exclusive possession thereof. Hardware Co. v. Hardware Co., 75 Mo. App. 518; Upham & Gordon v. Allen, 73 Mo. App. 224; Bank v. Fisher, 55 Mo. App. 51.

The action of the court in excluding the evidence of the interpleader offering to show that one Shellenberger was the owner of the note, is upheld: because it was immaterial. The interpleader could only recover upon the strength of his own claim and not upon the weakness of that of his adversary. Car Co. v. Barnard, 139 Mo. 142; Graham Paper Co. v. Morton B. Crowther, decided by this court but not yet reported.

The interpleader having failed to show that he had either a general or special property right in the articles in controversy, and the right to the immediate and exclusive possession thereof, the court very properly instructed the jury to find for the attaching plaintiff.

The cause is affirmed. All concur.

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ON REHEARING.

ELLISON, J.—On further consideration of this case we have concluded that no reason exists for a change of the views which are expressed in the original opinion.

The alleged agreement for an extension of the mortgage itself was made some time before it was executed and delivered. The mortgage did not contain any provision of that nature, but did contain a provision for immediate possession by the mortgagee on default of the note secured. A prior oral agreement not incorporated in the subsequent written instrument is of no avail.

The judgment is affirmed. All concur.

JAMES R. McDONNELL, Appellant, v. S. M. STEVINSON, Respondent.

Kansas City Court of Appeals, December 7, 1903.

REAL ESTATE BROKERS: Commissions: Sales: Pleading: Quantum Meruit. Where a real estate broker bottoms his action for commissions on a contract he can not, on failing to prove his contract, recover on *quantum meruit*, though a different rule prevails in justices' courts.

Appeal from Boone Circuit Court.—*Hon. John A. Hockaday*, Judge.

AFFIRMED.

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H. S. Booth for appellant.

(1) The court erred in overruling the plaintiff's motion for new trial. Schmidt v. Railroad, 149 Mo. 282; Bank v. Armstrong, 92 Mo. 265. (2) "While appellate courts will not review the action of trial courts in granting or refusing new trials where there is evidence to support it on the ground that the verdict is contrary to the weight of the evidence, such where it does not appeal to the trial case, on the contrary when it appears that the verdict is unsupported by the evidence, or that injustice has been done, it is the duty of the trial courts to interfere and award a new trial." And especially so where there is any evidence as in this case to show that the complaining party was entitled to a relief or judgment. Mellor v. Railway, 105 Mo. 470; McCay v. Underwood, 47 Mo. 187; McDonough v. Nicholson, 46 Mo. 35; Eideniller v. Kump, 61 Mo. 342; Parker v. Cassingham, 130 Mo. 349; Bank v. Wood, 124 Mo. 72. (3) A real estate broker employed to sell lands by the owner, finds a purchaser for the same, and does everything which he agreed to do, and the trade fails, not on account of any default on his part, or that of the purchaser, but because it is repudiated by the landowner, the broker is entitled to compensation. Harwood v. Diemer, 41 Mo. App. 49; Tyler v. Parr, 52 Mo. 249; Firch v. Trust Co., 92 Mo. App. 271; Reeves v. Bette, 62 Mo. App. 440; Timbermann v. Craddock, 70 Mo. App. 638; Huggins v. Hearne, 74 Mo. App. 87; Hayden v. Grille, 35 Mo. App. 655; Bayley v. Chapman, 41 Mo. 536; Gelatt v. Ridge, 117 Mo. 553; R. S. 1899, sec. 799; Bartley v. Railway, 148 Mo. 124; Hewitt v. Steel, 118 Mo. 473.

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N. T. Gentry for respondent.

(1) The trial court could very properly have decided the case in conformity with the fourth instruction asked by plaintiff. It in effect declared the law to be that if the defendant sold the farm to Pemberton before August 15th at noon, yet if the defendant never informed the plaintiff of that fact before noon of August 15th, but retained the plaintiff in his employ, and that the plaintiff produced Ryman before noon of said day, and that Ryman was ready, willing and able to purchase the farm at $5,000, then the plaintiff was entitled to recover. As this is the theory advanced at the trial by the plaintiff, the plaintiff is in no position to complain, even if it is an erroneous one; he is bound by the position he then assumed. Krup v. Corley, 95 Mo. App. 640; MacDonald v. Tittman, 96 Mo. App. 536; Sappington v. Railway, 95 Mo. App. 387; Horgan v. Brady, 155 Mo. 659. (2) No error was committed by the court in modifying plaintiff's third instruction. An addition was simply made to it so that it followed the issue tendered by the petition, and properly limited plaintiff's right to recover, as he himself had done. Feary v. Railway, 162 Mo. 96; Elliott on Appellate Procedure, sec. 494; Thompson on Trials, sec. 2350. (3) As the petition alleged a specific contract, it was incumbent on plaintiff to prove that defendant did agree to pay him $100 for negotiating a sale of the farm. In other words, to entitle plaintiff to recover, this (and indeed every other) material allegation of the petition must be supported by evidence. As there was a total failure of proof on this subject, the court correctly found for the defendant. R. S. 1899, sec. 798; Pruett v. Warren, 71 Mo. App. 84; Sisney v. Arnold, 28 Mo. App. 568; Haynes v. Trenton, 108 Mo. 123; Whipple v. Copper, 55 Mo. App. 557; Priest v. Way, 87 Mo. 24; Link v. Vaughn, 17 Mo. 585; Carson v. Cummings, 69 Mo. 325;

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Warson v. McElroy, 33 Mo. App. 553; Mohoney v. Reed, 40 Mo. App. 110; Haynes v. Bunch, 91 Mo. App. 467; Cole v. Armour, 154 Mo. 333.

BROADDUS, J.—This is a suit upon contract to recover $100 as commission for the alleged sale of defendant's farm. The petition alleged that a contract was entered into between plaintiff and defendant whereby defendant agreed to pay plaintiff said sum, provided plaintiff found a purchaser for the land at the price of $5,000.

There was evidence that plaintiff, who resided in Hallsville, Mo., was a real estate broker; that he had negotiations with a man by the name of Ryman, who was willing and able to purchase defendant's land at the price above mentioned; that plaintiff brought said Ryman and defendant together on the twelfth of August, 1902, at which time Ryman wanted to know of defendant if he would give him until Saturday following to close up the deal; that defendant would not give him such time to close the deal but consented to give him until the following Friday, August 15, at noon to do so. In the meantime, however, the land was sold to another person by the name of Pemberton, the sale being made through the agency of a Mr. Smith, a real estate broker who also had the farm for sale.

There was other evidence but it is not pertinent to the issue raised by the record. A jury was waived and the cause was tried by the court. The finding and judgment was for defendant, from which plaintiff appealed.

The plaintiff asked several instructions based upon the theory that if plaintiff produced a purchaser for the land at the agreed price who was able and willing to buy, then he was entitled to recover. These the court modified by the following language: "Provided, plaintiff has shown that defendant agreed to pay plaintiff one hundred dollars for making such sale, as averred in his petition."

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Defendant asked no instructions. It is apparent that the court found against plaintiff on the ground that he had sued on a contract, and had failed to prove it.

The plaintiff earnestly contends that as the evidence shows that he did produce a purchaser able and willing to take the farm at the agreed price he was greatly injured by the judgment of the court. We are impressed with the fact that there is much equity on plaintiff's part. But it was a case at law and as such we must view it. When the petition counts on contract, there can be no recovery of *quantum meruit.* Lumber Co. v. Snyder, 65 Mo. App. 568; Eyerman v. Cemetery Assn. 61 Mo. 489. The rule is different where the suit originated before a justice of the peace. See Walker v. Guthrie, 102 Mo. App. 420.

The plaintiff having failed to prove his contract, he was not entitled to recover on *quantum meruit.*

The cause is affirmed. All concur.

JOSEPH A. FULLERTON et al., Respondents, v. MOSES A. SCHLOSS, Appellant.

Kansas City Court of Appeals, December 7, 1903.

1. **CONTRACTS: Consideration: Release: Foreclosure: Taxes.** To secure the payment of an immatured debt the creditor promised the debtor to release him from an agreed bonus, and plaintiff made another loan to pay the debt, when the creditor refused to accept payment without the bonus. Thereupon the debtor paid the bonus, the creditor agreeing to refund the same if he secured a new loan for his money, which he did. *Held,* there was sufficient consideration for the first agreement and the release of the first was sufficient consideration for the second; and this notwithstanding the deed of trust securing the new loan might have been foreclosed by reason of the non-payment of taxes.

2. **VERDICTS: Excessive: Instructions.** The instruction in the case is approved, and the verdict held not to exceed the amount justified by the facts.

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Appeal from Buchanan Circuit Court.—*Hon. A. M. Woodson,* Judge.

AFFIRMED.

Chas. C. Crow for appellant.

(1) The instruction given on behalf and at the request of respondents was erroneous for the reason that said instruction did not advise the jury as alleged in respondents' petition that it was necessary to find that the second alleged agreement was made in consideration of respondents waiving their right, if any, under the first alleged agreement. Fegan v. Duval S. & G. Co., 92 Mo. App. 236. (2) Clearly respondents could not recover in this case on account of the breach of the first contract, and, under all the authorities, they can not recover on account of a breach of the second contract, for the reason that the money was paid in strict accord with the terms of the written contract and therefore there was no consideration for the making of said alleged contract to refund. (3) And especially is this true where respondent had the right to foreclose and collect five per cent attorney's fees in addition to all expense. Tucker v. Bartle, 85 Mo. 115; Willis v. Gammill, 67 Mo. 730; Brewing Co. v. Schoenlaub, 32 Mo. App. 357; Griffith v. Creighton, 63 Mo. App. 1; Price v. Cannon, 3 Mo. 453; Wetmore v. Crouch, 150 Mo. 671; Winter v. Cable Co., 73 Mo. App. 173; School Board v. Hull, 72 Mo. App. 403; Spratt v. Lawson, 75 S. W. 642.

John George Parkinson for respondents.

(1) If the least benefit or advantage be received by the promisee from the promisor or from a third person, or if the promisee sustained any the least injury or detriment, it will in either case constitute a sufficient consideration. Marks v. Bank, 8 Mo. 316; Lancaster v.

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Elliott, 55 Mo. App. 249; Columbia Inc. L. Co. v. Mfg. Co., 64 Mo. App. 115.

ELLISON, J.—Since the verdict in this case was for plaintiff we will state the facts as the evidence in his behalf tends to show them: Plaintiff executed two notes to defendant, one for $2,500, and one for $300, secured by deed of trust on real estate owned by plaintiff. The latter note was due in one year and the former in five years. It was provided in the deed of trust that plaintiff might pay off said notes at any time before due if he would pay defendant a bonus of six months' interest at eight per cent, amounting to $112. That several years before the largest note became due defendant desired plaintiff to pay them off and asked him to secure a new loan for that purpose, and that if he would do so he (defendant) would release and forego all claim to the bonus provided for in the deed of trust. Plantiff in compliance with this request and promise to release and forego all claim to the bonus, did procure another loan; but when he came to pay defendant the latter demanded that he pay the bonus as originally agreed and provided in the deed of trust. This, respondent at first refused to do, but it was finally agreed between them that if plaintiff would pay the bonus thus demanded defendant would make an effort to reloan the principal sums then being paid to him by plaintiff (or a like amount) and if he succeeded in doing so he would then pay back to plaintiff the bonus which plaintiff paid with the principal sum. Defendant did reloan the money but refused to pay back the $112 bonus, whereupon plaintiff brought this action and recovered judgment in the trial court.

It is urged by defendant that there was no consideration to support the agreement upon which the suit was brought. We think there was. The largest note was not due. Defendant proposed to plaintiff that if he would negotiate a new loan whereby he would be en-

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abled to pay off the debt, he (defendant) would release him of the bonus. It was a valuable service to defendant rendered by plaintiff when the latter negotiated a new loan for the purpose of paying him a debt not yet due. Then, when defendant came to propose to plaintiff that the latter should pay the bonus which he had agreed to release, plaintiff said he would do so if defendant would pay him back that amount if he could reloan the money. Defendant agreed to do it. It seems to us that the consideration is plain and ample. The consideration for the second contract was the release of performance of the first contract.

It seems that at the time of the agreement that plaintiff should negotiate a new loan, there was some default in the payment of taxes which, under the terms of the deed of trust, would have authorized defendant to foreclose, and the court so instructed the jury for defendant; stating therein that if therefore the payment made by plaintiff was voluntary he could not recover. But from the fact that the deed of trust could have been foreclosed for non-payment of taxes, it does not follow that it would have been. Plaintiff, at any time before that was accomplished, could have paid them and thus kept defendant from his money until it was due. Instead of exercising such right, plaintiff accepted defendant's proposition and negotiated a new loan.

There was only one instruction given for plaintiff. It clearly put the issue between the parties to the jury. It is not fairly subject to defendant's criticism.

We do not regard the suggestion that the verdict was for $12 more than justified by the facts, as well founded. The contract proven and which we have seen was supported by a consideration was for a return of the entire bonus.

An examination of all points and suggestions made by defendant fails to satisfy us that there is any error in the record, and the judgment is therefore affirmed. All concur.

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E. C. WHITE, Appellant, v. GEORGE A. SMITH et al., Respondents.

Kansas City Court of Appeals, January 4, 1904.

1. **EXEMPTIONS: Husband and Wife: Head of the Family.** So long as the marriage relation exists *de jure*, the husband must be regarded as the head of the family within the meaning of the exemption statute.

2. ———: **Married Women: Statutory Construction.** Under section 4335, Revised Statutes 1899, a married woman may invoke all exemptions and homestead laws now in force for the protection of her personal and real property where the husband has made no such a claim for the exemption of his property.

Appeal from Cole Circuit Court.—*Hon. James E. Hazell,* Judge.

AFFIRMED.

Barnett & Barnett for appellant.

(1) Mrs. McKay was not the head of a family. She lived with her husband and was supported by him. Therefore the husband and not the wife was the head of the family. Brown v. Brown, 68 Mo. 388; Whitehead v. Tapp, 69 Mo. 415; Gladney v. Berkley, 75 Mo. App. 98. (2) While she could, as a married woman under section 4335, Revised Statutes, invoke the exemption laws to protect the property owned by her husband, he being the head of the family, and not having claimed his own exemptions, yet as she is not the head of a family, she can claim no exemptions in her own property. Revised Statutes 1899, sec. 4335; Bank v. Redlinger, 95 Mo. App. 279. (3) Between husband and wife there can be but one homestead, and but one personal exemption

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and this exemption belongs to the husband as the head of the family. Gladney v. Berkley, 75 Mo. App. 98. (4) In this case the right of exemption still exists in the husband's property.

Silver & Brown for respondents.

(1) It was not necessary for Mrs. McKay to be technically the head of a family before she could claim the benefit of the exemptions contemplated by Revised Statutes 1899, sec. 4335. (2) Besides, the construction contended for by opposing counsel directly infringes on the rule adopted at an early day in this State that exemption and homestead laws are to be liberally construed in favor of the execution debtor. Megethe v. Draper, 21 Mo. 510; State, etc., v. Dill, 60 Mo. 433; Wauschaff v. Company, 41 Mo. App. 406; King v. King, 155 Mo. 406; Thompson on Homesteads, sec. 224.

BROADDUS, J.—This is a suit against defendant Smith and his securities on his bond as constable. The case was begun in a justice's court and was tried on appeal in the circuit court where defendants prevailed and plaintiff appealed. The facts were that plaintiff had obtained a judgment before a justice against one R. H. McKay and his wife for $41.98 and that one, Peasner, as executor of a certain estate, held in his hands the sum of $50, which was a part of the wife's distributable share in said estate, and that execution was issued against the husband and wife and said Peasner was summoned as garnishee, who, upon interrogatories being filed, answered that he was owing said sum to the wife and paid the same to the constable, taking his receipt therefor. The wife gave notice to the constable that she claimed the money in his hands as exempt under section 4335 of the Revised Statutes 1899. The constable, after some hesitation, paid her the money. The plaintiff claims that in so doing he committed a breach of his bond.

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The evidence tends to show that this was all the property owned by the wife except certain other funds in the hands of said executor upon which she had created a lien. It was proved that McKay, the husband and head of the family, made no claim of exemption in his own behalf.

It is contended by plaintiff that as she lived with her husband and was being supported by him she was not the head of a family and therefore not entitled to the exemptions provided by the statute.

In Gladney v. Berkley; 75 Mo. App. 98, the court held: "As between husband and wife there can be but one homestead right, and that in the absence of a statute this right must be asserted in the name of the husband because so long as the marriage relation exists *de jure* he must be regarded as the head of the family within the meaning of the statute." The homestead in question belonged to the husband and the court's decision had reference to property of that status only. It could not be held to apply to a case where the property in question belonged to the wife because it would clearly be against the very letter of said section 4335, which reads as follows:

"A married woman shall be deemed a *femme sole* so far as to enable her to carry on and transact business in her own name, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for and against her, and may sue and be sued at law and in equity with or without her husband being joined as a party. Provided, a married woman may invoke all exemption and homestead laws now in force for protection of personal and real property owned by the head of a family except in cases where the husband has claimed such exemption and homestead for the protection of his own property."

The language of the act is, that "a married woman may invoke all exemption and homestead laws, notwith-

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standing the husband may be the head of the family." The object of the statute seems to have been for the purpose of protecting a married woman because under existing laws at the time the act was passed she could not claim the benefit of the exemption and homestead laws because she was not the head of a family. Therefore it is in the nature of an enabling statute. It does not take away the husband's right as the head of the family to claim the benefit of said exemption and homestead laws and the wife's right to avail herself of said laws is not an absolute right for if the husband has claimed them the wife is precluded from doing so. It is only in cases where the husband has failed to exercise his right that the wife may exercise her own. The statute has thus provided that there shall not be two exemptions and two homesteads for the benefit of the same family. In the case under consideration the husband and wife were both judgment debtors and the husband having failed to claim his exemption the wife was authorized to do so by the very letter of the act.

We have found no decision by the appellate courts of this State on the question; but we think it is clear that the judgment was right and it is therefore affirmed. All concur.

H. D. JEROWITZ, Respondent, v. KANSAS CITY, Appellant.

Kansas City Court of Appeals, January 4, 1904.

1. **MUNICIPAL CORPORATIONS: Condition of Streets: Instructions.** A city is required to keep its streets in a proper state of repair and free from obstructions so that they are reasonably safe for travel; and an instruction requiring that the streets be kept in a "proper state of repair," and "free from obstruction," *and* "reasonably safe for travel," is improper. Russell v. Columbia, 74 Mo. 480, distinguished.

2. ———: ———: ———: **Harmless Error.** Though an instruction like the above is faulty, yet it is not reversible error where other instructions clearly lay down the rule.

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Appeal from Jackson Circuit Court.—*Hon. Willard P. Hall,* Special Judge.

AFFIRMED.

J. W. Garner, R. J. Ingraham and *L. E. Durham* for appellant.

(1) The third instruction given by the plaintiff is, erroneous in this: that it declares it was the duty of the defendant, Kansas City, to keep its streets in a proper state of repair, free from obstructions. Such is not the law. The defendant, Kansas City, is required by the law to keep its streets free from such obstructions only as render the street not reasonably safe for travel, and is only required to keep its street in such a state of repair as will render the streets reasonably safe for travel thereon. Vogelgesang v. St. Louis, 139 Mo. 135; Cossman v. St. Louis, 153 Mo. 299; Welsh v. St. Louis, 73 Mo. 74; Wallace v. Westport, 82 Mo. App. 522.

I. J. Ringolsky for respondent.

(1) The only error presented and saved and for consideration by this court alleged by the appellant is an error committed by the court in giving the third instruction asked for by the plaintiff. This instruction has been approved in the exact form in which it was given, by the Supreme Court of this State in a case, where the facts were almost identical with the facts in the case at bar. Russell v. Columbia, 74 Mo. 480. This case has been cited with approval in not less than forty cases, which can be found in The Citator, Missouri Decisions, page 122. And most recently in the case of Stern v. St. Louis, 161 Mo. 146.

ELLISON, J.—This action is for damages which plaintiff suffered by reason of an injury to his horse which he was driving along one of the streets of the

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defendant city. Plaintiff charges the injury to have been occasioned by defendant permitting an excavation in such street to remain improperly filled so as to leave a sudden depression into which the horse stepped. The judgment in the trial court was for the plaintiff.

The only point made for reversal which was mentioned in the motion for new trial relates to the third instruction for plaintiff wherein it was declared "that it was the duty of Kansas City to keep its streets in a proper state of repair, free from obstructions and reasonably safe for travel."

The objection to this instruction is that it imposes a greater burden of duty upon the city than can be legally required. It will be noticed that it requires that the street shall be kept in "proper state of repair" as well as "free from obstructions" and also "reasonably safe for travel." That is to say, the city is required to do those three things as independent and separate duties, neither having reference to the other. According to that instruction the city is not only to keep the street in "proper" repair, but it must keep it free from all obstructions, and it must also keep it reasonably safe for travel. The instruction should have been so written that the "proper state of repair" and the freedom "from obstructions" would have referred to and been qualified by the "reasonably safe for travel." It then would have read that it was the duty of the city to keep its streets in a proper state of repair, free from obstructions, *so that* they would be reasonably safe for travel. That is all the law requires. Blake v. St. Louis, 40 Mo. 569; Smith v. St. Joseph, 45 Mo. 449; Welsh v. St. Louis, 73 Mo. 71; Vogelgesang v. St. Louis, 139 Mo. 127; Crossman v. St. Louis, 153 Mo. 299.

It is true that the judgment was affirmed in the case of Russell v. Columbia, 74 Mo. 480, in which an instruction was given stating that it was the duty of the city to keep its streets "in a proper state of repair, free from obstructions and safe for travel." But the point

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here was not made on that instruction, and it is clear that it does not state the law as it was announced by the Supreme Court both before and since. It will be noticed that it requires that the street must be kept "safe," and not reasonably safe, the latter being the universally recognized duty. In stating the duty of the city in that case the court cites cases which had been theretofore decided, viz.: Blake v. St. Louis and Welsh v. St. Louis, supra, where the duty is correctly stated to be to keep its streets "in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel." And such is the duty as defined in the latest cases from the Supreme Court, cited above. And so it has been held reversible error for an instruction to omit the word "reasonably" as a qualification to the streets being safe. Smith v. Brunswick, 61 Mo. App. 578; Wallis v. Westport, 82 Mo. App. 522.

Yet it has been held in Burdoin v. Trenton, 116 Mo. 358, that giving an instruction with fault similar to this one was not reversible error in cases where other instructions clearly laid down the rule that the city was only required to keep its streets in a state of repair reasonably safe for travel. In this case that was done, not only in other instructions, but in other parts of the one we are discussing. On authority of that case we must therefore affirm the judgment. All concur.

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GEORGE VAUGHN, Respondent, v. THE VILLAGE OF GREENCASTLE, Appellant.

Kansas City Court of Appeals, January 4, 1904.

1. **MUNICIPAL CORPORATIONS: Villages: Powers: Parks.** Municipal corporations possess and can exercise other powers than those expressly granted, provided they are necessarily and fairly implied in or incident to the powers expressly granted; but under the statutes of Missouri a village has no power to purchase and hold real estate for a park.

2. ———: ———: **Definitions: Legitimate Purposes.** "Legitimate purposes," as applied to acts of municipal corporations, means such purposes as are authorized by the charter, and villages have no general power to deal in real estate.

Appeal from Sullivan Circuit Court.—*Hon. John P. Butler*, Judge.

REVERSED.

Wattenbarger & Bingham and *Calfee & Eubanks* for appellant.

(1) The court erred in holding that under the law and the evidence plaintiff was entitled to recover. The legislature by an act passed in 1895, now section 6067, R. S. 1899, confers upon cities the authority to purchase land for park purposes, and describes the manner in which it shall be done, that is by an ordinance describing the land purchased by metes and bounds. (2) The well established rule of law is, that municipal corporations possess and can exercise the following powers and none other. 1st. Those granted in express words. 2d. Those necessarily or fairly implied, or incident to the power expressly granted. 3d. Those essential to the declared objects and purposes of the corporation—

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not simply convenient, but indispensable. And any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation. 1 Smith on Municipal Corp., sec. 562; Knapp v. Kansas City, 48 Mo. App. 485; Trenton v. Clayton, 50 Mo. App. 535 and cases cited. (3) Neither the corporation or its officers, can do any act or incur any liabilities in excess of its powers, and all such acts are void.

Wilson & Clapp for respondent.

(1) Villages organized and existing under the general laws of this State have the right to purchase and hold real estate for park purposes. R. S. 1899, sec. 6004; Knapp v. Kansas City, 48 Mo. App. 485. Section 6067 and other sections of article 7 are not germane to the matter in hand. Neither is section 6010 apropos or applicable. (2) The right to purchase land was in this particular instance exercised by the town board in a legal manner. R. S. 1899, art. 6, chap. 91; R. S. 1899, secs. 6004, 6005; Eichenlaub v. St. Joseph, 113 Mo. 395; State ex rel. v. Milling Co., 156 Mo. 620.

BROADDUS, J.—Defendant is a village organized under article 6, chapter 91, Revised Statutes 1899. On March 6, 1892, at a meeting of the board of trustees of said village a motion was made that the board discuss the proposition of buying a piece of land for the purpose of converting the same into a park for the benefit of the village. After some discussion a further motion was made and carried that the chairman appoint a committee of three to act for the village and negotiate with one George Vaughn to purchase from him one and one-half acres of land for said park. A committee was accordingly appointed which at an adjourned meeting of the board reported favorably and that they had agreed to purchase amount of land named from said Vaughn for $250 and that he had agreed to make a deed for the

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same on an advance payment of the purchase price. A motion was made and carried to accept said report, whereupon, on motion made and carried, a warrant was drawn on the village treasurer for fifty dollars advance payment and issued to said Vaughn who thereupon made a deed to the property in question in favor of the village and deposited same with a third party. Afterwards, the defendant refused to accept said deed and further refused to pay the warrant for $50 advance payment, so issued as aforesaid. This suit is to compel payment of the same. Plaintiff recovered judgment and defendant appealed.

The defendant contends that under the statutes, which is its charter, it had no authority to purchase land for a park; and that if it had had such authority it could only exercise it in the manner provided by law: that is, by ordinance.

Section 6004 of said article six and chapter 91, Revised Statutes, amongst other things provides that a village, " . . . may grant, purchase, hold and receive property, real and personal, within such town, and no other, burial grounds and cemeteries excepted, and may lease, sell and dispose of the same for the benefit of the town," etc. Under this proviso there can be no question of the right of an incorporated village to purchase real property; but it can hardly be contended that it can do so except for village purposes. In fact, there is no such claim upon the part of plaintiff.

Section 6010, of said article, provides that a board of village trustees shall by ordinance have the power to "erect and maintain calabooses, poorhouses and hospitals," and "to organize and maintain fire companies," etc. The power being conferred to purchase and hold real estate, it is a necessary inference that the power to erect and maintain poorhouses, hospitals and fire companies and the village for these purposes was authorized to purchase, hold and receive real estate. And these powers granted to villages are almost indispens-

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able to their existence as minor municipal departments of state government. Said section 6010, contained in more than an entire page of the statutes, specifically enumerates all the powers which a village may exercise by way of by-laws and ordinances, and in which no reference is made whatever to parks.

It is, however, the law that a municipal corporation possesses and can exercise powers other than those expressly granted, viz.: "Those necessarily or fairly implied in or incident to the powers expressly granted," and "those essential to declared objects and purposes of the corporations—not simply convenient, but indispensable." Knapp v. Kansas City, 48 Mo. App. 485, and cases there cited. The power of a village to purchase and hold real estate for park purposes not being expressly granted we must look to the different provisions of the article in question in order to ascertain if there be any from which such power may be reasonably implied, and as no words can be found therein which even in the remotest degree contemplate that villages are authorized to establish and maintain parks, there is nothing from which an inference in that respect may be implied.

But it is insisted that as the purpose for which land may be purchased and held is not prescribed, defined or limited, it can therefore be bought and held for any legitimate purpose. But the term "legitimate purpose," as applied to the acts of municipal corporations, means such a purpose as is authorized by the municipal charter. It was not the intention of the Legislature to clothe incorporated villages with general power to deal in real estate in all instances where it was not actually prohibited, for instance, as a private person might do.

A village park may be in some sense an attraction and a convenience to a village, but it is not indispensable. And it seems that it was not so considered by the Legislature. Article 7 of said chapter makes pro-

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visions for parks for cities—but no such provision can be found anywhere in the chapter relating to parks for villages. The provision in the one instance for parks and the omission in the other to so provide for villages is a very clear intimation that the Legislature did not deem them indispensable to the latter. And taking into consideration the entire law governing cities, towns and villages, we find no authority vesting in the trustees of the latter the right to purchase real estate for park purposes.

It follows that as there is no express authority in the village charter, and none to be implied, and the park not being indispensable, the defendant was without authority of any kind to make the purchase of the land for the purpose contemplated. Such being our holding the remaining question is of no importance and therefore not decided.

The cause is reversed. All concur.

E. R. STEPHENS, Appellant, v. ARMSTRONG CASSITY, Executor, etc., Respondent.

Kansas City Court of Appeals, January 4, 1904.

1. **ADMINISTRATION: Demands: Attorneys' Fees: Expenses.** Attorneys' fees are not, strictly speaking, a claim against the estate in the hands of an executor, but are expenses of administration which the probate court should adjust on settlement with the executor.

2. **———: Expenses: Attorneys' Fees: Circuit Courts: Jurisdiction.** Circuit courts have jurisdiction to establish demands against estates, but the statute in no sense confers jurisdiction on such courts to adjust the claims of an eecutor for his services and expenses against the estate in his hands; that matter is wholly within the jurisdiction of the probate court.

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Appeal from Linn Circuit Court.—*Hon. John P. Butler,* Judge.

AFFIRMED.

H. Lander for appellant.

(1) The question of jurisdiction raised by the demurrer of the defendant in this cause was settled many years ago if the statutes and decisions of the appellate courts of this State are to stand against the ruling and judgment of the trial court. (2) The demurrer was sustained solely on the ground that the circuit court had no jurisdiction to try this cause. The circuit court had original jurisdiction to try this cause for the establishment of plaintiff's claim for services as an attorney against the defendant, who had his choice as to two forums, to-wit: The circuit court or the probate court, as the following authorities will most conclusively show. Gamble v. Gibson, Ex., 59 Mo. 585; State ex rel. v. Tittman, Admr., 103 Mo. 553; Nichols v. Reyburn, Admr., 55 Mo. App. 3. All of which authorities are directly in point, and decisive of this case. (3) The plaintiff's claim is a demand against the defendant as executor of the will of Presley Pound, deceased, therefore, the jurisdiction of the circuit court can be upheld by the language of the statute alone. Section 191 of the Revised Statutes. Nichols v. Reyburn, Admr., 55 Mo. App. 7.

O. F. Libby and *Harry K. West* for respondent.

(1) The probate court of Linn county has jurisdiction to allow and adjust appellant's demand as a claim against testator's estate on final settlement. State ex rel. v. Walsh, 67 Mo. App. 348; Nichols v. Reyburn, 55 Mo. App. 1; Jacobs v. Jacobs, 99 Mo. 427; R. S. 1899, sec. 223; Constitution of Missouri, sec. 34, art. 6. The circuit court could only hear and determine the amount of appellant's claim under R. S. 1899, sec. 191, and cer-

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tify it to the probate court for classification. The time for classifying claims had long expired before appellant brought his action, consequently the circuit court had no jurisdiction in the matter, and the demurrer was properly sustained. Garrett v. Carson, 11 Mo. App. 290; Ferguson v. Carson, 13 Mo. App. 29; Pearce v. Calhoun, 59 Mo. 271; R. S. 1899, secs. 191 and 192.

BROADDUS, J.—The plaintiff began his suit in the circuit court against the defendant as executor under the will of one Presley Pound, deceased, for compensation for services as an attorney and counselor at law rendered said executor in his management as such of said estate. A petition was filed setting out the facts to which a demurrer was interposed which the court sustained on the ground that it had no jurisdiction of the case. The plaintiff appealed, and contends here that the court below committed error in sustaining said demurrer, citing certain decisions of the Supreme Court of Missouri to uphold his contention, to-wit: Gamble v. Gibson, 59 Mo. 585, and State ex rel. v. Tittman's Admr., 103 Mo. 553. The first, on the question, only holds that an administrator or executor may avail himself of the aid of legal counsel for the value of whose services he may charge and credit against the estate in his hands. The second decides that taxes accruing on a personal estate in the hands of the administrator after the death of the deceased are demands against his estate within the meaning of the law, and may be established as such either before the probate or circuit court. Neither case has any application to the question under consideration here.

The plaintiff's demand is not, strictly speaking, a claim against the decedent's estate but one against the executor thereof. Legal services rendered an administrator or executor are but expenses of the administration and should be allowed as such only, and until they are so allowed they do not become demands against the

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estate of the decedent. And the probate courts only have jurisdiction to adjudicate such matters on settlements made with administrators and executors. R. S. 1899, sec. 223.

Section 191, idem, is intended to give to circuit courts jurisdiction to establish demands against the estate of deceased persons and can in no sense be construed as conferring jurisdiction to adjust the claims of the executor or administrator for his services and expenses against the estate in his hands. The sole jurisdiction in that matter is in the probate court.

The cause is affirmed.

ISABELLA HAIR, Executrix, etc., Appellant, v. R. J. EDWARDS et al., Respondents.

Kansas City Court of Appeals, January 4, 1904.

1. **BILLS AND NOTES: Possession: Ownership.** The general rule that possession of personal property implies ownership does not apply to negotiable promissory notes not payable to bearer or holder. Tapley v. Herman, 95 Mo. App. 537, limited.

2. ———: ———: ———: **Deceased Holder.** Possession of a note not payable to bearer nor indorsed in blank, is not *prima facie* evidence of ownership, but the presumption is that it belongs to the payee; nor is the rule different where such paper is found in the effects of a deceased person.

Appeal from Linn Circuit Court.—*Hon. John P. Butler*, Judge.

AFFIRMED.

West & Bresnehen for appellant.

(1) The note in suit was produced in evidence by the executrix of R. M. Hair, from which fact it may

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fairly be inferred that the note belonged to R. M. Hair at the time of his death. (2) Evidences of debt of all kinds, found in the possession of a decedent at the time of his death, raise the presumption that the decedent was the owner of such evidences of debt at the time of his death. 11 Ency. L. (2 Ed.), p. 829, footnote 1; Robbins v. Robbins (Ky. 1886), 1 S. W. 152; Karsch's Estate, 133 Pa. St. 84, 153 Pa. St. 397, 32 W. N. C. (Pa.) 173. (3) Aside from all inferences and presumptions of law, the evidence in this case shows, as a matter of fact, that R. M. Hair, deceased, was the owner and holder of the note at the time of his death, and that the respondent, Edwards, so regarded and treated him.

A. L. Pratt and *Burns & Burns* for respondent.

(1) The possession of a note, not payable to bearer, nor indorsed in blank by a third person, is not even prima facie evidence of ownership. A. J. Dorn v. Sarah Parsons, 156 Mo. 601-602; Cavitt v. Tharp, 30 Mo. App. 131-135; State v. Stebbins, 132 Mo. 337-338; Tiedeman on Commercial Paper, sec. 303; 1 Daniel on Negotiable instruments (3 Ed.), p. 517, sec. 574; p. 591, sec. 664a, and p. 686, sec. 741; 17 L. R. A., p. 327, footnote; Richardson v. Drug Co., 92 Mo. App. 526; Rice v. McFarland, 41 Mo. App. 489; Bowers v. Johnson, 49 N. Y. 435.

BROADDUS, J.—This suit was begun in a justice's court where it was tried and appealed to the circuit court, where it was again tried; and the judgment being against the plaintiff she appealed to this court.

The action is founded upon a negotiable promissory note executed by defendants and made payable to one J. M. Johnson, dated March 15, 1901, and payable in thirty days after date. There is no indorsement of the note and no written transfer of any kind to R. M. Hair, the plaintiff's testator who died in November of

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said year. It was shown at the trial that the note in question was delivered by the executrix to T. M. Bresnehen, her attorney, for collection, but there is no direct evidence that Hair died with it in his possession; however it may be reasonably inferred from all the testimony that such was the fact.

N. E. Wannamaker testified as follows: "I was one of the appraisers and clerk of the appraiser at the time the inventory of the estate of Richard Hair was taken. After that time, I think I was representing the plaintiff as executrix of her husband's estate with reference to the collection of this note, and all of the notes. I interviewed the defendant Edwards with reference to the note in controversy sometime along in February. I was in Mr. Brinkley's office and Mr. Edwards was there. I told him, Mr. Edwards, that Mrs. Hair had asked me to ask him when he would pay that note and he said that he was pushed now and that it would not be convenient for him to pay it now, but long about the first of June he said he would begin paying the note about $40 per month until it was paid. In about a month or two afterwards I met Mr. Edwards and he said: 'I made payments on that note, I hold receipts for payment on that note.' He walked with me up to Mrs. Hair's house. Mrs. Hair and Mr. Hays, were there; he showed them this receipt. He said he got the receipt from R. M. Hair. He also said: 'I hold two other receipts which I have not with me.' He said Mr. Hair had brought a man and introduced him as J. M. Johnson and those receipts were obtained from that man and he wanted credits for those receipts. He did not make any objection to paying the balance, simply claimed to have some receipts." Wannamaker further testified that he did not have the note at the time of said conversation and the same was not exhibited to defendants. Edwards also told Davis Hays about three months prior to the death of Hair that he still owed him about $173 or $175 on the note.

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At the conclusion of plaintiff's testimony the jury at the direction of the court returned a verdict for the defendants.

The declaration of one of the defendants to witness Hays before the death of Hair that he owed Hair the note and to witness Wannamaker that he would pay the note, less certain credits which he claimed, were scarcely evidence of ownership. They were more in the nature of admissions of the debt. Such declarations would not be evidence in a controversy between plaintiff and Johnson the payee of the note as to the question of ownership. And the statement of defendant that Hair in his lifetime brought a man and introduced him as J. M. Johnson, who gave his receipts for payments made, is as consistent with Johnson's ownership of the note as with that of Hair's. It would be a reasonable inference from such facts that Hair was only acting as Johnson's agent for collection. It seems therefore that the case must either stand or fall upon the theory of plaintiff that Hair having died in the possession of the note the law raises the presumption or the inference that he was the owner.

The general rule it is true is, that possession of personal property implies ownership but this rule does not apply to negotiable promissory notes not payable to bearer or holder. Plaintiff relies much on the case of Cummings' Estate, 153 Pa. St. 397. But there the deceased had been in possession of certain canal loan bonds for more than thirty years and for twenty-one years after they had been registered in the name of claimant's husband who during all said time had made no claim whatever to their ownership. These bonds we presume were payable to bearer as bonds of like character usually are and in that respect differed from the note in suit. The court held that under the facts the presumption was that the deceased was the owner. But the decision of the case was not based upon the mere

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fact that the bonds were in the possession of deceased at the time of his death.

Other cases cited by plaintiff have no application save that of Tapley v. Herman, 95 Mo. App. 537, wherein, in speaking of the note in controversy, the court says: "The paper itself was produced in evidence by plaintiff as the executor of Hosea Tapley. From that fact it may be fairly inferred that the document belonged to Hosea at the time of his death." The note was made payable to Whose Tatley instead of Hosea Tapley and the evidence went to show that Hosea Tapley was the person intended, and the decision of the court that it was competent to so show is good law, but the dictum that mere possession of a promissory note by an executor is a fact from which ownership may be inferred is not supported by any of the textwriters or by the decisions of any of the courts so far as we have been able to examine.

The general rule is, that the possession of a note not payable to bearer nor indorsed in blank by a third person is not prima facie evidence of ownership. Dorn v. Parson's Admr., 56 Mo. 601. And "the possession of an unindorsed note does not relieve the holder from the presumption that the note still belongs to the payee." Rice v. McFarland, 41 Mo. App. 489; Richardson v. Drug Co., 92 Mo. App. 515; Tiedeman on Com. Pap., sec. 303, p. 524; 1 Daniels on Neg. Inst. (3 Ed.), secs. 574, 664a, 741. It is not denied that this is the general rule, but that the rule is different where such paper is found in the effects of a deceased person, for the reason that as he can no longer speak the maker ought to be required to show the truth of the matter. This theory leaves out of consideration the statute, which also closes the mouth of the maker, thus prohibiting him from doing that which plaintiff insists he should do.

For the reasons given the cause is affirmed. All concur.

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FORD W. BENEDICT, Appellant, v. CHICAGO GREAT WESTERN RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, January 4, 1904.

1. **MASTER AND SERVANT: Negligence: Unusual Act: Stopping Freight Train.** If the master performs an act in the usual way, there is no negligence, but if the manner of doing the act is unusual and injury results to the servant the master is liable; and where a freight train is stopped by an emergency brake in the place of the usual and ordinary service brake without any occasion for such emergency stop there would appear to be negligence.

2. **———: ———: Two Methods of Acting: Brakeman on Rear Platform.** The rule that an employee who has two ways in performing his labor, one safe and the other dangerous, and voluntarily chooses the latter is guilty of contributory negligence, has no application to the facts of this case where a brakeman, as the train was slowing up at a water tank took his lantern and "markers," and braced himself on the rear platform for the purpose of hanging the "markers" when the train stopped, and was thrown from the platform by an unnecessary emergency stop.

3. **———: Injury in Sister State: Recovery in Missouri.** A brakeman injured by his master's negligence in Iowa may recover on the statute of that State in a suit brought in this State.

Appeal from Buchanan Circuit Court.—*Hon. W. K. James,* Judge.

REVERSED AND REMANDED.

C. F. Strop and *W. K. Amick* for appellant.

(1) Section 2002 of the statutes of Iowa was introduced in evidence. (2) The courts of this State will enforce the statutes of a sister State. R. S. 1899, sec. 547; Guerney v. Moore, 131 Mo. 650.

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James C. Davis for respondent.

(1) In an action by a servant against his master, wherein the former sustains injuries which he charges to be due to the negligence of the latter, no presumption on the part of the latter will be indulged. The negligent act of the master must be established and the burden of establishing it is on the servant. Smith v. Railway, 113 Mo. 70; O'Mallry v. Railway, 113 Mo. 319; Dowell v. Guthrie, 99 Mo. 653; Dowell v. Guthrie, 116 Mo. 646; Murray v. Railway, 101 Mo. 236. (2) The application of an emergency brake upon a locomotive attached to a train in motion is not, of and in itself, a negligent act, and if such application is made it will be presumed that it was made in the proper exercise of the use for which it was intended, unless the contrary appears by evidence. (3) Where there are two ways in which a given act may be performed, and the person engaged in the performance of the act voluntarily selects the dangerous way when a safer one is apparent to him and is thereby injured, he is guilty of contributory negligence. Moore v. Railway, 146 Mo. 572; Bolt & Iron Co. v. Brenhen, 20 Ill. App. 555; Bolt & Iron Co. v. Burke, 12 Ill. App. 369; Anderson v. Railway, 39 Minn. 523.

BROADDUS, J.—The plaintiff was a rear brakeman on one of the defendant's freight trains. The train on which he was injured was going from Des Moines, Iowa, to St. Joseph, Mo., on March 16, 1901. There were sixteen cars in the train. The first ten cars back from the engine were equipped with the airbrake; the six rear cars were not equipped with the airbrake. The airbrake was controlled and operated by the engineer on the engine. For all ordinary stops, such as stopping at stations and water tanks, and all cases except emergency, the "service stop," as it was termed, was used. The "service stop" checked the train gradually,

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but did not lock the wheels. The "emergency stop" was used only for a sudden stop in case of danger, and was a full application of all the brake power, which had the effect of locking the wheels. If a train was moving at a rate of four or five miles per hour and the "emergency brake" was applied it would lock the wheels hard. The effect of stopping the train was almost instantly, and the shock and recoil was unusually severe; while if the "service brake" was applied it would stop the train gradually, and there was no recoil. It was unusual to use the "emergency brake," and when it was applied persons about the train could generally hear the explosive sound which it made.

On the day and at the time plaintiff was injured the train was running at the rate of about four or five miles per hour and was approaching the water tank at Peru, Iowa, for the purpose of supplying the engine with water. It was then getting dusk. Plaintiff had been riding in the cupola of the caboose. Another train was following. As the train approached Peru and was slowing down plaintiff climbed down from the cupola, got his red lantern and the "markers" ready. "Markers" were red lights to be hung on both sides of the rear end of the caboose to designate the rear end of the train. It was plaintiff's duty to put these markers in place. Plaintiff stepped out on the rear platform with the red lanterns and "markers" in his hands. He set one of the "markers" and the lantern down on the platform. He took the other "marker" in one hand, and, holding it by the bail, grasped the iron railing of the platform, and grasped a handhold on the end of the car with the other hand, braced his feet, one against the iron railing and the other against the body of the car, and stood in this braced position waiting for the train to stop. This position was reasonably safe if the train had been properly managed, but while in this position the engineer applied the "emergency brake," which stopped the train almost instantly. The shock was so violent that it tore

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plaintiff's grasp loose and threw him against the end of the caboose, and the recoil cast him back off the platform on to a bridge and down into a creek. Both of the plaintiff's arms were broken by the fall, and he received other wounds and bruises.

The plaintiff's petition based his right to recover on the ground of negligence of the engineer in applying the emergency brake which was the alleged cause of the injury. The statute of the State of Iowa, where the injury was received, was pleaded and also introduced in evidence. This statute gives a right of action against a railroad company operating a railroad in that State to any employee for damages sustained in consequence of the neglect of a fellow-servant. Section 2002, Statutes of Iowa.

The defense was a general denial and also allegations constituting contributory negligence. At the close of plaintiff's case the court sustained a demurrer to his evidence. It is the contention of plaintiff that the application of the emergency brake under the circumstances was unnecessary and consequently constituted negligence. On the other hand, defendant contends that that act alone did not of itself amount to negligence. The record does not explain why the engineer applied the emergency brake in approaching the water tank instead of what is known as the "service stop," the first being adapted and used in instances of emergency, as its name implies, and the latter being used in ordinary cases where a stoppage of the train can be accomplished by a gradual application of the brakes.

We are confronted at the beginning with the question of whether the circumstances in proof would authorize a finding that no such emergency existed as justified the engineer in applying the emergency brake in question. Notwithstanding that ordinarily the "service stop" should have been applied, there might have existed some cause which rendered the application of the other brake necessary. Yet, it having been shown

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that the use of the latter was unusual and unnecessary on such occasions and it not being shown that its use was demanded or made necessary on the present occasion when it was the cause of plaintiff's injury, the natural and legitimate conclusion is that the act was negligent; and it devolved upon defendant to rebut such conclusion by showing that notwithstanding what was both unusual and unnecessary ordinarily, was demanded by the circumstances at the time in question.

An act which is performed in the usual manner in practice for the doing of such acts is presumed in law to be reasonably safe, and a servant injured while in the service of the master on such occasions is held to have assumed the risk, and the master is not liable to the servant for his damages. But if the mode adopted by the master is unusual and the servant is injured by reason thereof, the servant does not assume the risk and the master is liable for damages suffered by the servant. And the reason for holding the master liable to the servant under the facts in this case are much stronger, as it was shown that the act of the engineer, which was the act of the master, was not only unusual but, prima facie, unnecessary.

But it is contended by defendant that the plaintiff by his carelessness contributed to his own injury, in that he should have waited for the train to stop at the water tank before he went upon the platform to hang out the signal lights at the rear end of the train. What is meant is, that there was open to him two ways for putting out the signal lights: one to wait until the train stopped at the water tank when he should then have gone upon the platform and place his signals; and the other method was the one he adopted. And that as he selected the dangerous way he was guilty of contributory negligence and consequently not entitled to recover.

In Moore v. Railway, 146 Mo. 572, the court held that: "An employee who has a choice of two ways of

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performing his labor for his master, one of which is perfectly safe, the other subject to risks and dangers, and voluntarily chooses the latter, is guilty of contributory negligence and can not recover for the injuries resulting from such choice." But we do not think the rule should be applied as a matter of law to the facts of this case so as to prevent a recovery; for the reason that ordinarily the mere fact that plaintiff was upon the platform of the car for the purpose of placing the signals when the train should stop at the water tank was not an act accompanied with much risk or danger. At most it was a question for the jury whether under the circumstances plaintiff was guilty of negligence. It is a matter of common observation that brakemen are by the very necessities of their employment required for many purposes to be upon the platforms of the cars while the trains are in motion. However, had the plaintiff here known that the emergency brake was to be applied by the engineer to stop the train, he would have been guilty of negligence in having chosen for the performance of his duty a time fraught with danger.

As the injury to plaintiff was sustained while he was in the State of Iowa he seeks to recover under the laws of that State. This he may do. Guerney v. Railway, 131 Mo. 650; R. S. 1899, sec. 547, p. 238.

For the reasons given the cause is reversed and remanded. All concur.

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BUREN, Respondent, v. ST. LOUIS TRANSIT COMPANY, Appellant.

St. Louis Court of Appeals, February 2, 1904.

1. **STREET RAILWAYS: Right to Drive on Track.** One has a right to drive a vehicle on a street railway track, if in so doing he does not unnecessarily interfere with the operation of cars running thereon.

2. ———: ———: **Negligence.** One is not guilty of negligence, as a matter of law, so as to bar recovery for injuries received by collision with a street car, in driving on the track at a rapid speed, in the nighttime when it was very dark.

3. ———: **Duty of Companies: Light on Cars.** It is the duty of a street railway company to have its cars so lighted at night as to be seen at a safe distance by persons using the street, or to give warnings of their approach and so enable such persons to keep out of their way; and one travelling on the street has a right to presume that such duty will be performed.

4. ———: **Contributory Negligence: Jury Question.** In an action for injuries received from a collision with a street car while plaintiff was driving at a rapid rate of speed on the track, at night when it was dark and foggy, where there was evidence tending to show that there was no headlight on the car and no warning sounded of its approach, the question whether he was guilty of negligence which contributed directly to his injury, was for the jury.

Appeal from St. Louis City Circuit Court.—*Hon. E. M. Hughes*, Judge.

AFFIRMED.

Boyle, Priest & Lehmann and *Crawley, Jamison & Collet* for appellant.

Respondent's conduct under the circumstances detailed by himself and his witnesses, in heedlessly driving his team and wagon along defendant's track at a

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rapid trot on a dark, misty, foggy night, when he knew he was liable at any moment to be confronted by one of defendant's cars running down grade on slippery rails, was such an act of negligence or utter recklessness as should bar his recovery, notwithstanding his assertion that he did not see or hear the car before the collision. Appellant was entitled to a peremptory instruction, taking the case from the jury. Flutcher v. Railroad, 64 Mo. 484; Harland v. Railroad, 65 Mo. 22; Hallihan v. Railroad, 71 Mo. 113; Purl v. Railroad, 72 Mo. 168; Turner v. Railroad, 74 Mo. 602; Meloy v. Railroad, 84 Mo. 270; Weller v. Railroad, 120 Mo. 635; Bunyan v. Railroad, 127 Mo. 12; Yancey v. Railroad, 93 Mo. 433; Huggert v. Railroad, 134 Mo. 673; McManamee v. Railroad, 135 Mo. 440; Vogg v. Railroad, 138 Mo. 172; Culbertson v. Railroad, 140 Mo. 35; Kreis v. Railroad, 148 Mo. 321; Tanner v. Railroad, 161 Mo. 497; Hook v. Railroad, 162 Mo. 569; Cogan v. Railroad, 73 S. W. 738; Ledwidge v. Transit Co., 73 S. W. 1008; Carrier v. Railroad, 74 S. W. 1002; Zumault v. Railroad, 74 S. W. 1015; Moore v. Railroad, 75 S. W. 672; Barrie v. Transit Co., 76 S. W. 706; Boland v. Kansas City, 32 Mo. App. 8; Harris v. Railroad, 40 Mo. App. 255; Heiter v. Railroad, 53 Mo. App. 391; Gettys v. Transit Co., 103 Mo. 564.

Daniel Dillon and *T. F. McDearmon* for respondent.

(1) Plaintiff was not negligent in driving on the track of the defendant in the circumstances under which he did so, as shown by the evidence. In the first place, Florissant avenue was a public street and highway in the city of St. Louis and very much used by the public and it was not negligence *per se* to drive in the tracks of defendant laid in this public street. Plaintiff had the right to the use of the street for his horses and wagon as

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well as had defendant for its cars. Oates v. Railroad, 168 Mo. 544; Kolb v. St. Louis Transit Co., 76 S. W. 1053; Degel v. St. Louis Transit Co., 74 S. W. 157; Winters v. Railroad, 99 Mo. 517; Dohlstrom v. Railroad, 108 Mo. 536; Gratiot v. Railroad, 116 Mo. 464; Campbell v. Railroad, 75 S. W. 86; Weller v. Railroad, 164 Mo. 199; Hutchinson v. Railroad, 161 Mo. 254. (2) If the night was so dark that the motorman could not see whether a wagon was on the track ahead of him or not, it was his duty to sound his gong or give other warning of the approach of the car. Noll v. St. Louis Transit Co., 73 S. W. 909. And plaintiff had the right to presume that this precaution would be taken by the men running the cars over that track. Conrad Grocery Co. v. Railroad, 89 Mo. App. 397. (3) Even if plaintiff was guilty of negligence in driving on the track of defendant, yet, under the evidence, plaintiff was entitled to have his case submitted to the jury. The evidence shows clearly that after plaintiff had driven on the track, and was, of course, in a position where he was in danger of being struck by a car of defendant running on the same track, if defendant had used ordinary care, or any care at all in running its car, the collision would not have occurred, and if it had kept a vigilant watch for vehicles on the track or moving towards it, as the ordinance required, it could not have escaped seeing plaintiff's team and wagon on the track in time to have avoided running into them. Morgan v. Railroad, 159 Mo. 262; Klockenbrink v. Railroad, 172 Mo. 678; Hanlon v. Railroad, 104 Mo. 389, 390 and 391; Guenther v. Railroad, 108 Mo. 18; Dohlstrom v. Railroad, 108 Mo. 525; Degal v. St. Louis Transit Co., 74 S. W. 156; Shanks v. Springfield Traction Co., 74 S. W. 386; Barrie v. St. Louis Transit Co., 76 S. W. 706. (4) The night was dark, and there is no doubt that if there had been a headlight, or any light on that car, plaintiff, or one of the men with him, would have seen it in time to have avoided the car. The ordinance absolutely required

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that there should be a signal light on the car, and it was negligence *per se* on the part of defendant to fail to comply with the ordinance in this respect. Murray v. Railroad, 242.

STATEMENT.

Plaintiff was engaged in the business of selling crackers, cakes, bread, etc., to groceries, saloons, etc., in the city of St. Louis, and had a regular line of customers. He owned a wagon and team with which he made deliveries of goods to his customers. He lived in the northern part of the city on Florissant avenue, and kept his team at his home. In the afternoon of March 26, 1902, he loaded his wagon at a down town bakery, with the intention of delivering the goods to his customers the next morning. He had with him Henry Herbert, his helper, and on his way home from the bakery picked up Louis Wagoner, who lived near him. There was a saloon on Florissant avenue, from six to eight hundred feet south of plaintiff's home; when plaintiff arrived at the saloon, Herbert, Wagoner and himself stopped there for fifteen or twenty minutes and drank one or two rounds of beer. The three then got on the seat of the wagon, plaintiff on the right, Wagoner in the middle and Herbert on the left. Plaintiff did the driving. This was about 7:30 o'clock in the evening; it was very dark, and some of the witnesses say foggy and drizzling rain.

The evidence is, that on Florissant avenue where plaintiff was driving, the defendant has two railway tracks. The one on the east side of the street is laid with T rails so wagons can not drive on the track. East of this track the street was not improved and was not in use at that time by teamsters, so the only space on the street that could be used by wagons and teams was the west track of the railway and that portion of the street west of the west track which was improved. The

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evidence is that wagons travelling south were entitled to the right of way on that portion of the street west of the west track. There is also evidence that this part of the street was being cleaned at the time and there were piles of mud and dirt in it. Plaintiff's evidence is that when he got on his wagon at the saloon, he drove eastwardly until he came to the west railway track; that he then turned due north to drive to his home with the wheels on the east side of his wagon in the track and one or both of his horses between the rails. That he was driving north in a fast trot and when he had proceeded two hundred and fifty or three hundred feet from the saloon, his wagon was struck by something running south, he did not know what, he was thrown to the ground with such force as to render him unconscious and was severely injured. The evidence is that the wagon and team met a south bound car on the west track and collided with the car, in consequence of which, one of the horses was killed, the wagon smashed to pieces, its contents broken up and scattered, and plaintiff thrown to the ground; that Herbert and Wagoner were thrown on the front vestibule of the car, and that the car proceeded some fifty or sixty feet after it had collided with the wagon and team. Plaintiff testified that he looked and listened for a car but he neither saw nor heard one coming. Herbert and Wagoner testified that they were unconscious of the approach or presence of the car until it struck the team and they found themselves landed on the vestibule of the car. The three occupants of the wagon testified that there was no light in the car; that there was no headlight and the gong or bell was not sounded, nor any warning whatever given of its approach. There was considerable down grade to the south at the place of the collision; but H. C. Montgomery, an ex-motorman who had had something over a month's experience as a motorman, testified that a car running at a speed of eight miles per hour could have been stopped on that grade in from fifty-five to sixty

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feet with the brakes, and in thirty-five feet with the brakes and reverse. There was evidence of the value of the horse killed, the damage to the wagon, and of the extent and character of plaintiff's injury, of his loss of time and of his earning capacity.

Defendant's motorman, Howard Johnson, testified in substance, that the accident occurred about three hundred feet south of Marcus avenue; the car going down grade; that the night was very dark and foggy and misting rain; that there were lights in the car over the vestibule, visible to persons on the outside. That he first saw the wagon about thirty feet in front of the car, "turn in right across in front of me, met me full in the face;" that the car and team of horses were going at about the same speed, about eight miles an hour, the horses being in a gallop. That he did everything in his power to stop the car and prevent the collision, but was unable to do so; that he rang the gong just before plaintiff turned in on the track.

James Darling, the conductor, testified in substance that the electric lights were lighted in the car, and there was an overhead glass transom; that there was a head light on top which was lighted when they left the end of the road about five minutes before the accident, and that there was an illuminated sign outside the car. That a man coming from the south could see the car two or three hundred feet. That he did not see the accident, but from the looks of the ground supposed the car ran about ten or fifteen feet after the collision. That after the collision the car was standing on the rails with the trolley on. Witness supposed the car was running about eight or ten miles an hour.

Otto G. Kanick testified that he lived about three hundred feet from where the accident happened on Florissant avenue, and saw the collision. That he was standing about four hundred feet south of where it occurred on the street crossing, waiting for a car. That he was standing between the saloon and the place of the

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accident. That he saw these parties come out of the saloon; that they passed him and he had to get out of their way or they would have run over him. That they were driving fast, and the night was very wet and dark. That he was standing on the crossing and saw the car as soon as it came to the top of Marcus avenue, about a thousand feet away; that he saw the light of the car a thousand feet away and saw the headlight immediately before it struck the wagon; that there was nothing to obstruct a man's view sitting on top of a wagon. That he saw the car distinctly. That the men were driving fast, and when he saw them go on the track and the car coming he was watching for a collision, because the car was coming on the very track the wagon went up on.

At the close of plaintiff's evidence and again at the close of all the evidence, defendant offered instructions that under the evidence plaintiff was not entitled to recover. These instructions were denied. Others were were given submitting the issues to the jury who returned a verdict for plaintiff signed by ten of the jurors, assessing his damages at five hundred dollars. Defendant filed a motion for new trial which was overruled by the court and judgment entered for plaintiff on the verdict for five hundred dollars. Defendant appealed.

BLAND, P. J. (after stating the facts as above.)—The only error discussed in the brief of appellant's counsel is the refusal of the court to grant the instructions offered by it at the close of all the evidence, that "under the law and the evidence plaintiff is not entitled to recover."

Plaintiff offered substantial evidence tending to prove that the defendant was running its car over a travelled street on a dark night without any headlight or other light by which it could be seen, and without sounding the gong to notify persons, who might be on the track or so near thereto as to be struck by a passing car, of its approach. If these facts be true, then the

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defendant's motorman and conductor were guilty of gross negligence, and the only theory upon which the instructions in the nature of a demurrer to the evidence should have been given, was that all the evidence shows conclusively that plaintiff was guilty of negligence which directly contributed to his injury. The plaintiff had a right to drive on the defendant's railway track, if in doing so he did not unnecessarily interfere with the operation of cars on the track. Oates v. Railway, 168 Mo. l. c. 544; Degel v. St. Louis Transit Co., 74 S. W. (Mo. App.) l. c. 157; Kolb v. St. Louis Transit Co., 76 S. W. (Mo. App.) 1053. Negligence, therefore, can not be imputed to him from the mere fact that he was driving on the track, nor do we think that a court can, as a matter of law, say that he was guilty of such negligence as to bar recovery from the fact that he drove on the track at a rapid speed, in the nighttime when it was very dark. It was the duty of the defendant to have its car so lighted as to be seen at a safe distance by persons using the street or to sound the gong, or give some warning of its approach to enable persons to keep out of its way. Noll v. St. Louis Transit Co., 73 S. W. 907; Klockenbrink v. Railway, 172 Mo. l. c. 689; Gratiot v. Railway, 116 Mo. l. c. 464; Dahlstrom v. Railway, 108 Mo. l. c. 536; Conrad Grocer Co. v. Railroad, 89 Mo. App. l. c. 397. Plaintiff had a right to rely on the performance of this duty by the railway company and to assume that if a car was approaching him from the north, it would have a headlight by which it could be seen, or the gong would be sounded to give warning of its approach in time to allow him to move off the track in safety. We do not hold that the evidence does not tend to show that plaintiff was guilty of negligence that directly contributed to his injury—in fact we think the preponderance of the evidence is that way—but it is not all that way and when there is evidence pro and con on an issue of fact on trial, it is for the jury to pass upon its probative force, and when they have done so

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and the trial court has approved their finding by overruling the motion of the losing party to set aside the verdict, that issue of fact is not open to review by an appellate court.

The judgment is affirmed. *Reyburn* and *Goode, JJ.*, concur.

MARTIN, Respondent, v. CHOUTEAU LAND AND LUMBER COMPANY, Appellant.

St. Louis Court of Appeals, February 2, 1904.

SALES: Stranger Claiming Title. Where plaintiff alleged in his complaint that he sold a lot of ties, under a contract, and the purchaser, instead of paying him for them, paid the defendant who set up some claim to them, a motion in arrest of the judgment rendered in plaintiff's favor should have been sustained, because the proceeding was against the wrong party.

Appeal from Stoddard Circuit Court.—*Hon. Jas. L. Fort,* Judge.

REVERSED.

J. R. Young for appellant.

BLAND, P. J.—The suit was instituted before a justice of the peace on the following complaint filed by the plaintiff:

"Oscar Martin, Plaintiff, v. Bagnell Timber Company and Chouteau Land & Lumber Co., Defendants.

"Before T. D. Melrose, J. P., for the township of Duck Creek, county of Stoddard, and State of Missouri.

"Plaintiff for his cause of action states that the Bagnell Timber Company are now, and have at all times hereinafter named, been a corporation duly organized under and by permission of the laws of the State of Mis-

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souri, and said corporation are now and was on the nineteenth day of June, 1901, engaged in the business of buying railroad ties and other railroad timbers, and that the Chouteau Land & Lumber Co. are now and was on the nineteenth day of June, 1901, a corporation organized under the laws of the State of Missouri, and engaged in the business of selling land and timber. Plaintiff further states that on or about the nineteenth day of April, 1901, he purchased of the Chouteau Land & Lumber Co., forty acres of timber for the sum of five dollars, said timber land being and lying in the county of Stoddard and known as the forty acres joining the place Gilbert Martin lives on, on the south. Plaintiff further states that he made of said timber, railroad ties and delivered said ties to the Bagnell Timber Company at West Dudley, Mo., on the Iron Mountain and Southern Railroad, one hundred and thirty-six of said ties marked to Oscar Martin and sixty-two marked to Gilbert Martin for which said Bagnell Timber Company was to pay plaintiff twenty-five cents per tie and that said Chouteau Land & Lumber Company, by its duly authorized agent claimed said ties by right of accession and demanded of Bagnell Timber Company the amount due on said ties, wherefore said Bagnell Timber Company paid to Chouteau the amount due on said ties and wholly refused, neglected and failed to pay this plaintiff for his said ties and by reason of said refusal and neglect to pay plaintiff for his said ties, the plaintiff is damaged in the sum of $200.

"Wherefore plaintiff prays judgment for the sum of $45.50 for his debt and for the sum of $200 for his damages, making a total of $245.50 together with all costs and interest at the rate of six per cent from date of filing."

The cause was appealed to the circuit court where it was dismissed as to the Bagnell Timber Company. The issues were then submitted to the court, who, after hearing the evidence found for plaintiff and assessed his

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damages at $45.50. Timely motions for a new trial and in arrest of judgment were filed which the court overruled, whereupon defendant appealed.

We think the motion in arrest of judgment should have been sustained. The complaint alleges that plaintiff delivered the ties to the Bagnell Timber Company; that said company agreed to pay him twenty-five cents per tie for the one hundred and ninety-eight ties delivered but instead the Bagnell Timber Company paid the Chouteau Land & Lumber Company, who claimed them "by right of accession." On delivery of the ties to the Bagnell Timber Company under the contract of sale alleged in the complaint, the ties became the property of that company (if plaintiff had a title) and plaintiff's right of action to recover the contract price of the ties was against that company and not against the Chouteau Land & Lumber Company, who set up some sort of a claim to them which the Bagnell Timber Company is alleged to have recognized. If the Bagnell Timber Company, after receiving the ties under the contract of purchase alleged in the complaint, denied the title of plaintiff to the ties, it did so at its peril and would, in a suit by plaintiff against it for the contract price of the ties, be bound to show that plaintiff had no title and that after learning this fact it bought the ties of the true owner. Plaintiff, it seems to us, has proceeded against the wrong party. His right of action, if any he has, is against the Bagnell Timber Company.

The judgment is reversed. *Reyburn* and *Goode, JJ.*, concur.

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DUFFY, Respondent, v. ST. LOUIS TRANSIT COMPANY, Appellant.

St. Louis Court of Appeals, February 2, 1904.

1. **CARRIERS OF PASSENGERS: Duty of Carrier: Injuries While Alighting from a Car: Pleading and Proof.** In an action by a passenger for injuries received while alighting from a street car, the petition alleged that the defendant's servants, after the car had been stopped, caused it to suddenly start forward while he was proceeding to alight, whereby he was thrown and dragged, producing the injuries complained of. The evidence showed that the plaintiff indicated to the conductor his desire to get off, and, in obedience to the conductor's signal, the motorman slowed down the car, but could not bring it to a full stop on account of defective brakes, and the plaintiff, after the car had run past the stopping place and was going at the speed of an ordinary walk, undertook to get off, when the speed was suddenly accelerated whereby he was thrown and injured. *Held*, the evidence tended to prove the negligence alleged in the petition, that it was not the defective brakes, but the act of the motorman causing the car to start forward, which caused the accident. *Held*, further, the plaintiff was not bound to show that the defendant's servants knew his position when the speed was accelerated, since the conductor saw him leave his seat for the purpose of getting off the car; it was the duty of the conductor and motorman to hold the car for a reasonable length of time for plaintiff to get off in safety. (Per **Bland, P. J.**)

2. **PERSONAL INJURIES: Elements of Damages: Future Pain and Loss of Earnings.** Where the evidence showed that the plaintiff's ankle was broken and was and would remain weaker than the other one, an instruction that the jury might consider future pain and anguish, and loss of earnings, is held by a majority of the court to have been no error, although plaintiff was at the time of the trial doing the same work and receiving the same wages as before the injury. (**Bland, P. J., dissenting.**)

3. ———: **Contributory Negligence: Pleading.** Where defendant did not plead contributory negligence in defense, an instruction to the jury that there was no issue that the injury sustained by the plaintiff was caused by his own negligence in getting off the car, was not a reversible error. (**Bland, P. J., dissenting.**)

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Appeal from St. Louis City Circuit Court.—*Hon. D. D. Fisher*, Judge.

AFFIRMED.

Boyle, Priest & Lehmann and *Crawley, Jamison & Collet* for appellant.

(1) Under the pleadings and evidence in this case plaintiff was not entitled to recover, and the trial court should have so declared to the jury by peremptory instruction as requested by defendant. At the end of the trial the cause of action alleged in plaintiff's petition remained unproven in its entire scope and meaning. As to the necessity of pleading and proving that the jerk in such cases was unnecessarily or unusually violent, see Saxton v. Railroad, 72 S. W. 720; Pryor v. Railroad, 85 Mo. App. 367; Bartley v. Railroad, 148 Mo. 124; (2) As to the necessity of proving that defendant's servants either knew or by the exercise of care might have known of plaintiff's situation at the time he fell, see Strauss v. Railroad, 75 Mo. 185; Cullar v. Railroad, 84 Mo. App. 340. (3) It was error for the court to authorize a recovery for a future pain and future loss of earnings without evidence upon which to base it. Duke v. Railroad, 99 Mo. 347; Barr v. City, 105 Mo. 550; Mellor v. Railroad, 105 Mo. 450; Nixon v. Railroad, 141 Mo. 425; Cobb v. Railroad, 149 Mo. 609; Robertson v. Railroad, 152 Mo. 383; Evans v. City, 76 Mo. App. 20; Madison v. Railroad, 60 Mo. App. 599; O'Brien v. Loomis, 43 Mo. App. 29; Mammerberg v. Railroad, 62 Mo. App. 563.

BLAND, P. J.—After alleging that plaintiff was a passenger on one of defendant's street railway cars and the contract to carry him to his place of destination, (Clara and Easton avenues, in the city of St. Louis) and

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the duty to stop the car a reasonable length of time to let plaintiff off, the petition proceeds as follows:

"Yet the plaintiff avers that the defendant, unmindful of its said undertaking and of its duty in the premises, did by its servants in charge of its said car, carry the plaintiff past his said point of destination, and thereafter, to-wit: As said car was approaching the intersection of Easton and Goodfellow avenues, at the request of plaintiff, did slow down said car until it was stopped or moving very slowly at or near said Goodfellow avenue and Easton avenue in the city of St. Louis, and invited the plaintiff to alight from said car whilst so stopped or slowed down.

"That the plaintiff in obedience to such invitation to alight from said car whilst so stopped or slowed down, proceeded to the platform and step of said car to alight therefrom, and was proceeding to alight from said car, and whilst he was in the act of doing so, and before he had a reasonable time or opportunity to do so, defendant's servants in charge of its said car negligently caused and suffered said car to be started forward, whereby the plaintiff was thrown from said car to the street and dragged and greatly and permanently injured upon his body and legs and internally, sustaining a fracture of the bones of his right foot and ankle and bruises upon his body and arms and his leg and knee."

Plaintiff testified that he was a passenger on one of defendant's Easton avenue cars and that his destination was Clara and Easton avenues. He further testified as follows:

"Q. Why was it that you did not get off at Clara that night? A. Through a mistake of mine.

"Q. Through a mistake of what? A. My own mistake.

"Q. Now, after you passed Clara, and ascertained that you had passed Clara, tell the jury what you did to indicate that you wanted to get off the car and where?

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A. I got off the car at Goodfellow avenue; about twenty-five yards west of Goodfellow avenue, when we went by this side of Rinkle's Grove. That is how I seen I was too far ahead.

"Q. When you found out you had passed your point of destination, tell the jury what you did? Tell the jury what you did to indicate to the motorman or conductor you wanted to get off the car? A. When I seen this I shoved down to ring the bell for the car to stop at Goodfellow avenue. He was in the front part of the car, standing sidewise, some transfers in his hand counting them. He changed the transfers to one hand from the other, put up his left hand to the bell; as he did that I walked out, the car was going below speed as it approached; I stepped out and fell. There was not out there any houses the south side until you get to Blackstone avenue, the nearest building. A few houses on the north side.

"Q. When you walked out what did the car do towards slowing down or stopping? A. She slowed down until about twenty-five yards, maybe thirty, a little less, or more, west of Goodfellow avenue.

"Q. Did it come to a full stop? A. No, sir; it did not.

"Q. How was it moving, how slow, at the time you got on the step as you were about to step off? A. About an ordinary walk would keep up with it.

"Q. An ordinary walk? A. About an ordinary walk.

"Q. When you stepped off the car, tell the jury what occurred; what did the car do? A. Well, in some way, I believe that the brake didn't work on the car; he started the car too sudden on me. I had my foot up as the car slowed up, I was preparing the other foot to get it up, ready to get off the car. The car started off in that position. I had hold of the handrail with my left hand; I made a grab with my right hand to catch the rail, missed it and it turned me out on the street, dragged

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four paces, maybe five paces.

"Q. When you say the car started up how did it start, fast or slow? A. Started with a jerk, started with a jerk, fast, started with a twist, turning on a twisting sensation.

"Q. What did the car do after it threw you off; did it go on? A. Went ahead.

"Q. Did it stop at all? A. No, sir; no, sir; it did not.

"Q. Now, how were you holding, describe that to the jury; what was your position when this jerk of the car took place, and the car went on? A. Standing up like this (indicating); I had my foot there ready to get off the car this way (indicating), hold of the left rail with my left hand.

"Q. When this jerk came what effect did it have on you, explain to the jury; did you remain on the step or were you thrown off the step? A. I was forced off.

"Q. Did you fall a clean fall or were you dragged? A. I was dragged about four paces; the second time that it jerked the car jerked clean away from me; turned me over in the street."

He admitted that the car passed Clara avenue without stopping, through his mistake in failing to give a signal for it to stop. His testimony shows that he attempted to get off after the car had passed Goodfellow avenue, from twenty-five to thirty yards, and that it was running at a speed of about on ordinary walk for a man; that the accident happened at night. He nowhere stated that the signal was given by him to stop the car at any other point than at Goodfellow avenue, and does not state as a matter of fact, that any signal was given for the car to stop at Goodfellow avenue, however, it is inferable from his testimony that after he pressed the electric button, the conductor gave the motorman the signal to stop before reaching Goodfellow avenue. There is no evidence that the bell was given

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for the motorman to go ahead, after reaching Goodfellow avenue. The plaintiff said he believed the brake did not work, and that the car was started too suddenly on him by the motorman. On this evidence, it is insisted by defendant that plaintiff's own evidence shows that there was no negligence on the part of defendant's servants that contributed to plaintiff's injury, and that its instruction for a compulsory nonsuit should have been given. On the question of whether or not there should have been a compulsory nonsuit, the evidence should be considered in its most favorable aspect for the plaintiff. Considering all of it that bears upon the accident, about this state of facts is shown to exist: Plaintiff, without noticing, let the car pass Clara avenue and then gave the usual warning of his desire to get off at the next street (Goodfellow avenue). The usual signal was given by the conductor to the motorman to stop at Goodfellow avenue and in obedience to this signal, the motorman tried to stop the car and slowed it down, but it did not come to a full stop, on account of the failure of the brakes to work properly, and when plaintiff reached the rear platform, he discovered the car had passed the stopping place from twenty-five to thirty yards, but was still slowed down to a speed of an ordinary walk, and he undertook to get off, but before he could alight from the car, its speed was suddenly accelerated whereby he was thrown off and injured. The negligence shown by this evidence to have caused the injury was not that the car was caused to lurch forward or on account of the defective brake, but that it was suddenly started forward by the motorman, while the plaintiff was in the act of alighting from it, and tends to prove the negligence alleged in the petition.

The contention that plaintiff was bound to show that the defendant's servants knew of his position when the speed of the car was accelerated, is answered by the evidence that plaintiff was a passenger; that he had given the usual signal of his wish to get off the car, and

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that the conductor, in recognition of that signal, had signalled the car to stop and saw plaintiff leave his seat and go to the rear platform for the purpose of getting off. In these circumstances, it was the duty of the conductor and motorman to hold the car still for a reasonable length of time to allow the plaintiff to get off in safety.

On the measure of damages, the court gave the following instruction:

"If the jury find for the plaintiff they should assess his damages at such sum as they may believe from the evidence will be a fair compensation to him.

"1. For any pain of body or mind which the jury believe from the evidence he has suffered and will suffer by reason of said injuries and directly caused thereby.

"2d. For any loss of the earnings of his labor which the jury believe from the evidence he has sustained and will sustain by reason of his injuries and directly caused thereby.

"3d. For any expenses necessarily incurred for medical and surgical attention which the jury believe from the evidence he has sustained directly caused by said injuries."

Plaintiff's evidence shows that the injury to the ankle (broken bone) had healed; that the ankle would remain for some time weaker than the other one, but there is no evidence that it will cause any severe pain or mental suffering in the future. The evidence further shows that plaintiff, at the time of the trial, and for several months prior thereto, had done and was doing the same work and was receiving the same wages as before the injury. There is, therefore, no evidence that he will suffer future pain of body or mind, or future loss in his earnings on account of the injury. He is entitled to compensation for any future or permanent impairment of the strength and use of his ankle, but not

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for any loss of future earnings, as the evidence shows he is earning the same wages he earned before the injury and is doing exactly the same work.

The court gave the following instruction for plaintiff:

"The court instructs the jury that there is no issue in this case that the injury, if any, sustained by the plaintiff was caused by his own negligence in getting off a car of the defendant."

There was no plea of contributory negligence, and hence no occasion for the giving of this instruction. Vogeli v. Marble & Granite Co., 49 Mo. App. 643; Taylor v. Railway, 26 Mo. App. 336; Hughes v. Railway, 127 Mo. 447.

For error in giving these instructions, I think the judgment should be reversed and the cause remanded; but Judges *Reyburn* and *Goode* are of the opinion that the evidence tends to prove that plaintiff will suffer future pain and mental anguish from the injury and that his earning capacity has been permanently impaired, that the damages are moderate and the judgment should be affirmed. The judgment is accordingly affirmed.

FIRST NATIONAL BANK OF LEAVENWORTH, KANSAS, Appellant, v. WRIGHT, Respondent.

St. Louis Court of Appeals, February 2, 1904.

1. **WITNESS: Wife's Testimony: Agency.** A wife, who kept her husband's accounts, did his writing and at his dictation wrote letters to the mortgagee concerning a note and chattel mortgage on his cattle, was not his agent so as to make her a competent witness for him, under section 4656, Revised Statutes of 1899, in regard to a settlement of the note, had between her husband and the agent of the mortgagee.

2. **EVIDENCE: Contents of Lost Instrument.** Where one party to a suit claimed to have lost certain letters received from the other, and the other denied having written them, it was competent for the first to testify to their contents.

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3. **AGENCY: Scope of Authority.** In an action on a note secured by chattel mortgage on some cattle, where the mortgagee, after some correspondence with the mortgagor concerning the condition and care of the cattle, sent an agent to look after them, with a letter of introduction, as claimed by the mortgagor, which was lost, and the mortgagor's testimony as to the substance of the letter, showing the scope of the agency, was somewhat indefinite, the evidence was insufficient to submit to the jury the question of the agent's authority to settle the debt, the mortgagee having denied the authority and the letter.

4. **CHATTEL MORTGAGES: Private Sale: Mortgagee as Trustee.** The mortgagee in a chattel mortgage, who sells the mortgaged property at private sale under a power in the mortgage, is thereby trustee for the mortgagor and bound to make the property bring the best price obtainable, or stand the loss.

Appeal from Ralls Circuit Court.—*Hon. David H. Eby*, Judge.

REVERSED AND REMANDED.

Warner, Dean, McLeod & Holden for appellant.

(1) Rosa L. Wright, the wife of the defendant, was not a competent witness under the statute. R. S. 1899, sec. 4656. At common law, the wife was not a competent witness for any purpose in an action by or against her husband. The statute removed her disability only in certain specified cases, one being "in all matters of business transactions when the transaction was had and conducted by such married woman as the agent of her husband. Hearle v. Kreihn, 65 Mo. 205; Lynn v. Hockaday, 162 Mo. 122; Wilden v. McAllister, 91 Mo. App. 451; Jessie Co. v. Wallace, 84 Mo. App. 378. (2) After proof of the agency is given, the testimony of the wife must be limited to the matters which come properly within the scope of the agency. Bliss v. Franklin, 13 Allen 244; Bruce v. Matthews, 101 Mass. 64; Bunker v. Bennett, 103 Mass. 516; Robertson v. Brost, 83 Ill. 119; Hale v. Danforth, 40 Wis. 382; Mountain v. Fisher, 22 Wis. 93; Robnett v. Rob-

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nett, 43 Ill. App. 191; Esterbrook v. Prentiss, 34 Vt. 457. (3) The court erred in permitting the defendant and his wife to give oral testimony of their recollection of the contents of the letter written by the bank in reply to the defendant's letter of September 7th. The court ignored the well-established principle that where a document has been lost, before oral evidence can be given of its contents, it must first appear that no copy can be produced. In other words, the court ignored the degrees of secondary evidence and permitted the defendant to introduce the lowest form of secondary evidence in lieu of a higher and better form which is recognized as next best after the original. Briggs v. Henderson, 49 Mo. 534; Golson v. Ebert, 52 Mo. 269. (4) In the same way, it has been held that before oral evidence can be given of the contents of a lost instrument, which had been executed in duplicate, the duplicate must be accounted for and unless that is done the oral evidence is inadmissible. Matthews v. Railroad, 66 Mo. App. 665; Ins. Co. v. Goodrich, 74 Mo. App. 359; Stevenson v. Hoy, 43 Pa. St. 191; U. S. v. Britton, 2 Mason (U. S.) 468; Nash v. Williams, 20 Wall. 226; Harvey v. Thorpe, 20 Ala. 250; Williams v. Waters, 36 Ga. 458; Illinois Land Co. v. Bonner, 75 Ill. 315; Mercer v. Harnan, 39 La. Ann. 94. (5) The court erred in allowing the defendant to testify to the contents of the alleged letter of introduction because no competent evidence had been introduced to show the execution of this letter. Johnson v. Fecht, 94 Mo. App. 605; Holman v. Bacchus, 24 Mo. App. 629; Fowle v. Adams Express Co., 9 Mo. App. 572; Perry v. Roberts, 17 Mo. 40; Shea v. Seelig, 89 Mo. App. 146; Zollman v. Tarr, 93 Mo. App. 234; Briggs v. Henderson, 49 Mo. 531; Nichols v. Kingdom Iron Co., 56 N. Y. 618; Brown v. Massey, 138 Mo. 519; O'Connor Co. v. Dickson, 112 Ala. 304. (6) The witness Davis had no authority to make the alleged agreement to accept the cattle in payment of the debt. He

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was a special agent clothed with power to deal with the defendant concerning the condition and care of the cattle. His agency went no further. He had no power to make any compromise of the debt or accept anything other than money in payment of it. Mechem on Agency, secs, 375, 376, 381 and 383; Story on Agency (8 Ed.), sec. 78; Hoster v. Lange, 80 Mo. App. 234; Sweet v. Sullivan, 77 Mo. App. 128; Bank v. Brightwell, 148 Mo. 364; Bank v. Bank, 151 Mo. 329; Cummings v. Hurd, 49 Mo. App. 139; May v. Trust Co., 138 Mo. 275; Barcus v. Hannibal Road Co., 26 Mo. 102; Henson v. Keet Mercantile Co., 48 Mo. App. 214; Willard v. Siegel Gas Co., 47 Mo. App. 1; Vanderline v. Smith, 18 Mo. App. 55; Maxwell v. Railroad, 91 Mo. App. 582.

Allison & Allison and *E. L. Alford* for respondent.

(1) It is well-settled law that an agent acting within the apparent scope of his authority may bind his principal though in fact he exceeds his authority. To escape liability the principal must prove that the third party knew the limitation of the agent's authority. Clack v. Electrical Supply Co., 72 Mo. App. 506; Knowles v. Bullene & Co., 71 Mo. App. 341; May v. Trust Co., 138 Mo. 275; 1 Thompson on Trials, sec. 1371; Galvin v. Railroad, 21 Mo. App. 273; Nicholson v. Golden, 27 Mo. App. 132. (2) Question of agency is a matter of fact and if there is any evidence tending to prove the authority of the agent then the act can not be excluded from the jury. McClung's Executors v. Spotswood, 19 Ala. 165-170; Krebs v. O'Grady, 23 Ala. 732. (3) The wife is competent to testify in behalf of her husband when she is his agent, and may prove such agency herself. Reed v. Peck, Guitar and Watson, 163 Mo. 333; Leete v. Bank, 115 Mo. 184; Ingerham v. Weatherman, 79 Mo.

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STATEMENT.

In June, 1899, defendant purchased of W. B. McAlister & Co., at Kansas City, Kansas, fifty-four head of cattle for $2,268. For the purchase price defendant gave his promissory note secured by a mortgage on the cattle. He moved the cattle to his farm in Ralls county, Missouri. At the maturity of the note a new one was given for the principal and accumulated interest on the original note, aggregating $2,378.45. The renewal note matured in six months from date and bore interest at nine per cent per annum from maturity. Before maturity, the note with the mortgage on the cattle was, for value, transferred by McAlister & Co. to the plaintiff bank. On November 7, 1900, the bank indorsed on the note a credit of $1,635.11. The suit is to recover the balance of the note.

The answer, omitting caption, is as follows:

"Now comes the defendant and for answer to plaintiff's amended petition herein, admits the execution of the note sued on as alleged in the plaintiff's said petition and denies each and every allegation in said plaintiff's petition and not herein expressly admitted.

"For other and further answer to plaintiff's said petition defendant states that on the fifteenth day of September, 1900, he paid the plaintiff the amount of said note in full and that said payment was then and there accepted and received by the plaintiff in full satisfaction and payment of the said note.

"Defendant further states that on the fifteenth day of September, 1900, and before the commencement of this action, he, the said defendant, delivered to the plaintiff fifty-two cattle of great value, to-wit, the value of — dollars in full satisfaction and settlement and discharge of the note herein sued on and of the cause of action in plaintiff's said petition mentioned, and which said fifty-two cattle the plaintiff then and there accepted and

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received of and from the defendant in full satisfaction, settlement and discharge of said note sued on herein and of said cause of action in plaintiff's petition mentioned.

"And that at the time said cattle were so received by plaintiff, and at all times down to and including the seventh day of November, 1900, they were well worth the full amount of the principal and interest of said note. Defendant having fully answered asks to be discharged and for costs and for general relief."

The reply was a general denial of the new matter set up in the answer. The verdict and judgment were for the defendant. Plaintiff appealed.

About September 12, 1900, the plaintiff bank sent W. H. Davis to the farm of the defendant in Ralls county to see about the mortgaged cattle. After arriving there he took possession of the cattle for the bank, secured pasturage for them for six or eight weeks and then shipped them to Kansas City and sold them there on November 7th, under the mortgage at private sale. The net sum realized on the sale was $1635.11 which was credited on the note by the bank. The principal controversy in the case centers on an alleged agreement or compromise, testified to by defendant and denied by plaintiff's evidence, that Davis took the cattle in full payment and satisfaction of the note, and on the authority or want of authority of Davis as the agent of the plaintiff to make the alleged agreement or compromise, if it was made.

The note fell due June 26, 1900, when plaintiff wrote defendant making inquiry about the mortgaged cattle and their condition. This letter the defendant answered as follows:

"Vandalia, Mo., July 2, 1900.

"Dear Sirs:

"Yours received. There are 53 head of cattle on good blue grass. They will average now, I think, close

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to 1,100 lbs. They have not been weighed for some time. The cattle will remain on the farm until sold. There is $65 more against these cattle beside the note you hold, for feed bill last winter. Cattle are worth the money and doing well.

"Yours truly,

"D. W. Wright."

No further correspondence was had between the parties until September 7, 1900, when the defendant wrote plaintiff as follows:

"Dear Sir:

"The cattle are doing no good, shrinking every day. I am out of water in the pasture and can't do justice by them. I am not able to rent other pasture. I am ready to turn them over to you; you to pay a note of $65 against them for feed bill. I have put in two summer's grass and winter's feed and that is all I can lose on them.

"Yours truly,

"D. W. Wright."

Plaintiff answered the above letter as follows:

"September 8, 1900.

"We are in receipt of your favor of the seventh inst. We were in hopes the cattle were getting better every day. If they are doing no good, something must be done at once. Please write me by return mail and say what, in your opinion, they will average in weight and quality, and if you would recommend shipping now."

On the following day defendant wrote the president of the bank as follows:

"A. Caldwell,

"Dear Sir: Yours just rec'd. In regard to the cattle the quality is good but they have shrunk until I hardly think they will average over 1,000 pounds. They did fine until my grass dried up and water gave out. I

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have no grass where the water is and they have got to breaking in the corn fields and they act so I have to keep them in a lot and feed them green corn. I think you could get a pasture for them about eight to ten miles from here where there has been rain. The cattle are not ready for market. I will just have to give them up as I am not able to hold them. The cattle have nice big frames on them but no flesh. If the season had been as usual for grass and water they would have easily weighed 1,200 lbs. this fall. They should be put on good grass as soon as possible.

"Yours truly,

"D. W. Wright."

Defendant testified that in answer to this letter he received a letter from the president of the bank, which he had lost and was unable to produce, and of which he had no copy. He was thereupon permitted to testify to its contents which he gave as follows:

"Well, answer to the letter to them, they just replied contents noted, and the man that acted for them as their agent to look after those matters for them was out and would be in in a few days and as soon as he returned they would send him down and any transactions that I and him might make would be perfectly satisfactory to them."

Defendant also testified that Davis brought with him a letter of introduction from the bank, at the time he took possession of the cattle, and that this letter had also been lost or destroyed and he had no copy of it. Thereupon he was permitted to testify from his memory of its contents which he gave as follows:

"Well, as I stated, this is to introduce to you our man Davis, who will represent us in this cattle business, and anything he should do or you and him should do in the transaction that would transpire between you two would be satisfactory to us; satisfactory to the bank; that was about the substance of it."

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It is in evidence by both parties that Davis had the note and mortgage, and also defendant's letter of September 7, 1900, in his possession when he took possession of the cattle.

Defendant's evidence is that when Davis came to his place he had the cattle in a dry lot and was feeding them on green corn, and after much dickering and making of several propositions by him to Davis, and after Davis had repeatedly examined the cattle, he (Davis) finally agreed to take the cattle in full payment of the note, and to pay a feed bill of sixty-five dollars which defendant owed for hay he had purchased and fed to the cattle the previous winter. That after making this agreement, Davis took possession of the cattle, hired pasture for them, paid the feed bill of sixty-five dollars and subsequently hired pasture of him (defendant) and put the cattle on it and kept them there until he shipped them to Kansas City. Over the objections of the plaintiff, he further testified that at the time Davis took possession of the cattle there were fifty-two head (two of the original fifty-four having died) and that they would have averaged a thousand pounds in weight and were worth from four and one-half to four and three-quarters cents per pound, and when the cattle were sold by Davis, they were worth more on the market than was due on the note. Over the objection of plaintiff, defendant's wife testified (by deposition) corroborating all of the material part of the evidence of the defendant.

The evidence on the part of the plaintiff is that A. Caldwell was the president of the plaintiff bank and the principal officer in its management; that all the correspondence of plaintiff in respect to the note and cattle was conducted by him, and letter-press copies of all letters written by him to defendant were kept; that he wrote neither of the letters claimed to have been received by defendant and lost, and that the letter-press books of the bank (produced at the trial) contained no

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copy of either of the alleged letters. That Davis was a farmer and a cattle dealer living near Lawrence, Kansas; that he never was at any time a general agent of the bank, but was employed occasionally to look after cattle for the bank upon which it had or was considering loans, but had never been employed or authorized by the bank to deal with any question of indebtedness on cattle, and that he had no such authority to deal with defendant. That he was authorized to look after the cattle and had nothing to do with defendant's indebtedness to the bank; that all questions of indebtedness to it had been uniformily passed on by the bank itself. Davis testified that he had no letter of introduction from the bank to defendant that he remembered of. That defendant told him he had written the bank that he wanted to turn the cattle over to it and that he thought they would turn his paper back to him; that he told defendant he had nothing whatever to do with that, and said to defendant: "We will have to get some pasture for these cattle, something will have to be done to save the bank and to save you." Defendant said if he turned over the cattle he ought to have his paper, and that he (Davis) told him he had no authority to give him the mortgage or papers, and if he would not deliver the cattle on agreeable terms he would have to replevy them; that defendant then said he did not want to have any trouble, that he was willing to give the cattle up, that he had no water or feed to take care of them, and he (Davis) then said: "I will get a rig and go and hunt pasture for the cattle," and defendant volunteered to go with him, and they went and hunted pasture for the cattle. He further testified that the cattle brought three dollars and sixty cents per hundred on the Kansas City market and sold for their full market value, and that no better offer had been made to him for the cattle by anyone at any time after he took possession of them.

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BLAND, P. J. (after stating the facts as above.)— 1. The evidence of defendant's wife was admitted on the theory that she was his agent. The only evidence, if evidence at all, of agency is that she wrote her husband's letters for him as dictated by him and kept his accounts and did his writing generally. At common law a married woman is disqualified to testify for her husband in a civil suit brought by or against him; but under clause 3, section 4656, R. S. 1899, she is not disqualified to testify for him in respect to "any matter of business transactions, where the transaction was had or conducted by such married woman as the agent of her husband." The transactions (if they may be called transactions) testified to as having been conducted by the wife for her husband as his agent, were writing his letters at his dictation and keeping his books of account. The transactions about which she may testify, under the statute, are transactions had with some person other than her husband, and not transactions had by the husband himself with some other person. There is not a word of evidence that any agreement in respect to the cattle or the debt was made by and between Davis and Mrs. Wright, as the agent of her husband; on the contrary, defendant testified that the transaction was conducted by himself with Davis and all his wife had to do with it was to write out the receipt for the cattle as dictated by Davis. She was not defendant's agent in this transaction, the transaction was not conducted by her and she was an incompetent witness and her deposition should have been excluded.

2. We do not think the court erred in admitting defendant's evidence of the contents of the letters he testified he had received from the bank and had lost. The evidence tends to show that the bank had no copy of these letters, if they had ever been written, and it denied that they had been written. In this state of the evidence, the memory of defendant of the contents of these

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lost instruments was the best and only means of reproducing their contents. It is contended that there was no proof of the execution of the alleged lost letter of introduction. The letter was not received in due course of mail, but if received at all, it was handed to defendant by Davis who was sent to him by plaintiff as its authorized agent; we think this was prima facie evidence at least of its execution.

3. If there is substantial evidence tending to show that Davis was authorized to settle or compromise the debt with defendant, it must be found in the letters of defendant or in those written by the bank to defendant, as both Davis and Caldwell, president of the bank, denied that any such authority was given. These letters must be construed with reference to the specific object had in mind when written. Mechem on Agency, sec. 306. The subject under consideration both by defendant and the plaintiff, and to which their letters specifically referred, was the present condition and the future care of the cattle. The defendant was without water or feed for them and voluntarily called the attention of plaintiff to this fact by his letter of September 7th. The cattle had to be cared for. Defendant was in a position that he could not care for them. It was to the interest of both parties that they should not be allowed to perish, nor so shrink in flesh as to become of little or no value. The bank and the defendant had this condition in mind during the period of their correspondence as is shown by the letters read in evidence. Nowhere is the debt itself mentioned in this correspondence and the letters furnish no evidence whatever tending to prove that Davis was authorized to settle or compromise the debt. The alleged lost letters, the contents of which were testified to by defendant, do not mention the debt. The matters to which these letters refer were matters mentioned by defendant in his letters to plaintiff, to-wit, the cattle and their condition, and "the transactions" to be

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made by the man to be sent by the bank can not be construed to mean any transactions other than the possession and the care and disposition to be made of the cattle, hence these lost letters furnish no evidence that Davis was authorized to settle or compromise the debt itself. The circumstance that Davis paid the feed bill and had the note and mortgage in his possession, we think would (if there was other evidence tending to prove his authority to settle the debt) corroborate such evidence, but standing alone is of itself insufficient to prove such authority. Opposed to the evidence of defendant, that Davis did take the cattle in settlement and payment of the note and that he had authority to do so, stands out prominently the fact that, notwithstanding the debt, according to defendant's contention, was paid and settled and that he knew Davis had in his possession the note and mortgage, yet he got neither of them, nor did he demand them of Davis; instead he was contented to take from Davis the following receipt for the cattle:

"September 15, 1900.

"Received this day of D. W. Wright 52 head of cattle, the same being all now alive of the 54 head bought of J. B. McAlister Live Stock Commission Co. on June 21, 1899.

"W. H. Davis."

This conduct on the part of defendant is wholly inconsistent with defendant's contention, and not in accord with the usual course of business.

We think the evidence was wholly insufficient to submit to the jury the question of Davis' authority to settle the debt.

The mortgage provided that on default of payment of the note, the cattle might be sold at Kansas City at private sale by the holder of the note. They were so sold by Davis as the agent of the bank. In these circumstances, the bank was the trustee of the defendant

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and was bound to sell at the best obtainable price in the Kansas City market on the date when sold. If they were sacrificed the bank should stand the loss. For the errors herein noted the judgment is reversed and the cause remanded. *Reyburn* and *Goode, JJ.*, concur, the latter in paragraphs 1 and 2.

STATE OF MISSOURI, Respondent, v. BEAN, Appellant.

St. Louis Court of Appeals, February 2, 1904.

HUSBAND AND WIFE: Witness. As an exception to the common law rule, the wife is a competent witness against her husband in a prosecution for wife abandonment and may make affidavit as a basis for the information charging him with the offense.

Appeal from Dent Circuit Court.—*Hon. L. B. Woodside*, Judge.

AFFIRMED.

J. J. Cope for appellant.

The well known and settled rule of law is that the lawful wife of a man is in no case competent to testify against him, or to make affidavits in any legal proceeding adverse to him, unless she be the immediate and direct object of the crime of misdemeanor complained of, and in cases of high treason. This doctrine is fully recognized in our Supreme Court in the case of State v. Hannah Coleman, 14 Mo. 119; Roscoe on Crim. Ev. 112-114; Commonwealth v. Easland, 1 Mass. 15; State v. Anthony, 1 McCord 285; Rex v. Sergeant, 21 Eng. Com. Law R. 453; State v. David Berlin, 48 Mo. 576; State v. Berlin, 42 Mo. 572; State v. Wallis, 119 Mo. 483, 29 Am. and Eng. Ency. of Law 624; State v. Evans, 138 Mo. 116.

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BLAND, P. J.—Based on the affidavit of the wife of the defendant, an information, charging him with wife abandonment, was filed in the circuit court and chiefly on her testimony he was convicted.

The contention of the appellant in the trial court was and is here, that the wife is not a competent witness against her husband, and for this reason is not such a person as is authorized to make an affidavit as a basis for filing an information as provided by section 2477, R. S. 1899. Neither the husband nor wife is, at common law, a competent witness for or against the other in a civil or criminal cause in which the other is a party. 1 Greenleaf, Evidence, sec. 334 (Lewis Ed.); Wharton, Crim. Evid. 390. There are exceptions to this rule allowed from necessity of the case. The principal one is that in all cases of personal injuries or violence committed by the husband or wife against each other, the injured party is a competent witness against the other. 1 Greenleaf, Evidence, sec. 343; Wharton, Crim. Evid., sec. 393; State v. Boyd, 27 Am. Dec. 376, and extended note where the authorities are collated; State v. Willis, 119 Mo. 485; Bassett v. United States, 137 U. S. 496; Cotton v. State, 62 Ala. 12; State v. Burlingame, 146 Mo. 207; State v. Kodat, 158 Mo. 125. Another exception to the rule is to permit the wife to testify against the husband whenever she is the particular individual directly injured by the crime committed by her husband, and the facts are peculiarly within her knowledge and impossible or difficult of proof by any witness other than his wife.

In State v. Newberry, 43 Mo. 429, this exception to the rule was recognized and the wife held to be a competent witness against her husband, and competent to make an affidavit to the information charging him with the offense of wife abandonment, the identical crime charged here. The exception to the rule was applied in a civil case by the Kansas City Court of Appeals in the

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case of Maget v. Maget, 85 Mo. App. 6. It follows that the judgment should be affirmed, and it is so ordered. *Reyburn* and *Goode, JJ.*, concur.

WOLFSBERGER, Respondent, v. MORT and FRITSCH, Defendants; FRITSCH, Inter-Appellant.

St. Louis Court of Appeals, February 2, 1904.

1. **FRAUDULENT CONVEYANCES: Husband and Wife: Husband's Earnings Given to Wife.** An insolvent debtor can not continuously give to his wife practically all his earnings and allow her with such gifts to acquire, in her own name and for her separate use, property and hold it exempt from the demands of his creditors.

2. ——: ——: ——. In the proportion his money is used to purchase property in her name, she holds such property in trust for him and his creditors.

Appeal from St. Louis County Circuit Court.—*Hon. J. W. McElhinney,* Judge.

Affirmed.

Geo. L. Edwards for appellant.

The decree of the circuit court is not authorized by nor founded upon any pleading in the case, and therefore can not stand. Newham v. Kenton, 79 Mo. 382; Muenks v. Bunch, 90 Mo. 500; Reed v. Bott, 100 Mo. 62; Leet v. Gratz, 92 Mo. App. 438.

Henry A. Hamilton and *E. Henry Wolfsberger* for respondent.

Where property is acquired in the name of the wife during coverture, the presumption of law is that it was paid for with the means of the husband, and is his prop-

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erty; the burden is on her to show that it was acquired by her, with her separate means; in the absence of such evidence the presumption is that it was acquired with his means. In many of the cases the presumption is said to be a violent one. Bump on Fraudulent Conveyances (4 Ed.), sec. 249; Snyder v. Free, 114 Mo. 369; Hoffman v. Nolte, 127 Mo. 120, 134; Lins v. Lenhardt, 127 Mo. 289; Patton v. Bragg, 113 Mo. 601; Sloan v. Torry, 78 Mo. 623, 625; Garrett v. Wagner, 125 Mo. 450, 461; Halstead v. Mustion, 166 Mo. 488, 494.

STATEMENT.

The evidence is that on January 2, 1897, Jesse Mort borrowed of plaintiff two hundred dollars and gave his promissory note therefor, due six months after date, with Emil Fritsch as security. The note was not paid at maturity and plaintiff brought suit thereon before a justice of the peace, and on September 11, 1901, recovered a judgment against both Mort and Fritsch for the principal and interest ($256.40) then due. The judgment was not paid. In 1902, Mrs. Fritsch, the interpleader, and wife of Emil Fritsch, was advised by her physician to go to Colorado Springs, Colo., for the benefit of her health. She, preparatory to removing with her husband and children to Colorado Springs, advertised her personal property for sale on June 21, 1902. The plaintiff brought suit on his judgment (on the note) in the circuit court of St. Louis county, and in aid of the suit sued out a writ of attachment against Emil Fritsch. The officer to whom the writ of attachment was delivered seized a lot of personal property, as the property of Emil Fritsch, found in the house where he resided with his wife and children, in the city of Kirkwood, St. Louis county. A grand piano was one of the articles attached by the officer. Fritsch and wife gave a forthcoming bond for the property and it was returned to them. Mrs. Fritsch filed her interplea claim-

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ing the attached property as her separate and individual property. The allegations of the interplea were denied by plaintiff and the issues thus made were submitted to the court sitting as a jury who, after hearing the evidence, found that the interpleader had purchased the piano partly with her separate means and partly with the means of her husband, Emil Fritsch; that of the latter's money ($237.50) was used in the purchase of the piano, and adjudged the attachment a lien on the piano for the payment of that sum, giving to interpleader the right to discharge the lien on the payment of said sum of $237.50. From this judgment the interpleader appealed to this court.

The title to none of the property attached is involved on this appeal except the piano. The evidence shows that at the time of the marriage of Mrs. Fritsch to her husband (1891) she had saved a few hundred dollars from her earnings; that with this money Mrs. Fritsch purchased a lot in the city of Kirkwood, taking the deed to herself. After purchasing the lot, she borrowed a thousand dollars, giving as security a deed of trust on the lot executed by herself and husband. With this money she erected a dwelling on the lot in which she and her husband resided until the day the attachment was levied. The thousand dollars borrowed were paid mostly by a new loan of nine hundred dollars secured as was the first loan. This debt has not been paid. The evidence shows that the management and control of their household affairs was given over entirely by Fritsch to his wife; that all purchases of furniture and household goods were made by her, in her name and were claimed by her as her separate property. Mrs. Fritsch's evidence tends to show that she kept roomers or boarders from time to time, did some fancy work by which she earned some money and received from her husband from month to month during their marriage, small sums of money earned by him at his trade, and that all the surplus saved from these sources was de-

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posited in bank by her to her individual account. No estimate of the amount received by her from boarders or roomers was given at the trial, nor of the income from her fancy work. It is shown that Emil Fritsch earned about twenty-five dollars per week at his trade. He and his wife testified that he furnished the money to pay for the maintenance of the family, consisting of himself, wife and several children, but no estimate is given of what it cost to maintain the family. It is shown that for several years prior to the levying of the attachment Mrs. Fritsch kept her deposit account in a bank at Kirkwood and that both she and her husband drew checks against that account (the checks drawn by her husband being signed "Lena Fritsch by Emil Fritsch"), and that at the date of the levying of the attachment there was a balance of four hundred dollars to the credit of Mrs. Fritsch in the bank. The evidence is that the piano was bought by Mrs. Fritsch on July 15, 1899, for five hundred and twenty-five dollars; that she paid three hundred dollars cash, gave two notes, one for fifty-eight dollars and the other for fifty-nine dollars, and an old piano valued at fifty dollars for the balance of the purchase price; that the bill of sale for the piano was made to her and that she afterwards paid the two notes. Fritsch was a barber and owned no property except the furnishings of his barber shop worth about one hundred dollars.

BLAND, P. J. (after stating the facts as above.)—We think the evidence clearly shows that much of Mrs. Fritsch's bank deposit was of money received from her husband. The evidence is so indefinite as to the amount she earned by her own labor as to make it impossible to form a just estimate of it, but from her testimony we think the inference is reasonable that her earnings were wholly insufficient to make up half of the amount it is shown she deposited from time to time in bank. But it is contended that as the evidence shows Emil Fritsch

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had no property except the furnishings of his barber shop, and as he did not at any one time give to his wife money that was subject to be taken on execution or attachment, no fraud was committed against the plaintiff as his creditor. If this contention is good law, then an insolvent debtor may give over to his wife his monthly earnings in small sums and the latter may deposit these gifts in bank to her individual credit or purchase therewith property in her individual name and in this manner in time accumulate a large bank account, or acquire in her own right a large amount of property free and exempt from the claims of her husband's creditors, when if the money had been deposited by him or the property purchased in his own name, it would have been subject to levy. It is the law that a husband has the right to give his personal services and skill to the management of his wife's property without any other consideration than the support of himself, and that the result of his labor on his wife's property is not subject to levy. Seay v. Hesse, 123 Mo. 450; Gruner v. Scholz, 154 Mo. 415; State ex rel. v. Jones, 83 Mo. App. 151; Hibbard, Spencer, Bartlett & Co. v. Heckart, 88 Mo. App. 544. He may also give his wife personal property when such gift is not in fraud of his creditors. Bank v. Simpson, 152 Mo. 638; Sanguinett v. Webster, 127 Mo. 32; Thomas v. Thomas, 107 Mo. 459; Bettes v. Magoon, 85 Mo. 580. But it seems to us that to permit an insolvent husband, having creditors, to systematically and continuously give his wife practically all his earnings and to allow the wife with these gifts to acquire in her own name and for her separate use, personal property and hold it exempt from the just demands of the creditors of her husband, when if the same property had been acquired directly by the husband, it would have been subject to levy, would work a gross fraud on the husband's creditors. The learned circuit judge, as is shown by the declarations of law given and refused, concluded that gifts made in the manner indicated by

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Fritsch to his wife were fraudulent as to plaintiff. We think this was the correct view of the law. Shanklin v. McCracken, 151 Mo. 587. We think, furthermore, that the evidence abundantly sustains the finding of the trial court that a portion of Fritsch's money was used in the purchase of the piano and that the trial court correctly held that in the proportion his money was used in payment for the piano, the interpleader held the piano in trust for him and correctly subjected his interest to the payment of plaintiff's judgment. Jones v. Elkins, 143 Mo. 647.

The judgment is affirmed. All concur.

MARTIN, Appellant, v. WITTY et al., Respondents.

St. Louis Court of Appeals, February 2, 1904.

1. **EVIDENCE: Escrow.** When a written undertaking is deposited in the hands of a third party, to be held by him until some condition is performed before delivery, parol evidence is admissible to show the performance of the condition for the purpose of showing that the contract may be enforced.

2. ———: ———. **Parol Evidence to Vary Written Contract.** But parol evidence is not admissible for the purpose of engrafting upon the contract a condition of delivery which, in fact, is an essential condition of the contract itself, one which would vary its terms.

(Dissenting Opinion by Goode, J.)

3. **CONTRACT: Delivery.** If a contract is delivered to the obligee, it takes effect at once as a complete contract, no matter what parol conditions were attached to it and these can not be shown.

4. ———: ———: **Escrow.** But if, instead of being delivered to the obligee, a contract is deposited with a third party, it is permissible to show by oral testimony that it was deposited as an escrow and was not to take effect until a certain parol condition was complied with.

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5. ——: ——: ——. Under the evidence in this case, which is examined at length, it was a question for the jury whether the contract sued on was delivered.

Appeal from Scotland Circuit Court.—*Hon. E. R. McKee,* Judge.

REVERSED AND REMANDED (*with directions*).

Berkheimer & Dawson for appellant.

(1) The contract in evidence provided that the five hundred dollars was to be paid upon a certain date, to-wit: the first day of May, 1901, this being the case, it was an independent and absolute promise to pay the amount on that date. Overton v. Curd, 8 Mo. 420; Portage v. Cole, 1 Saunders 320, note 1. (2) When (as in this case), the promises of both parties are absolute and independent of each other, upon a breach of his promise by one party, the other may sue him without averring that he has performed his own promise and it is no defense to such action for the defendant to plead that the plaintiff has failed on his part to perform his part of the agreement. American and English Cy. of Law (1 Ed.), page 909, title Contracts; Thorp v. Thorp, 12 Mo. 455-564; Cases cited to support the text; Underhill v. Saratoga and W. R. Co., 20 Barb. 455; Edgar v. Boyes, 11 S. & R. (Pa.) 445; 7 Am. and Eng. Ency. Law (2 Ed.), page 119, title Contracts, note 1, cases cited; Wheler v. Garsge, 28 N. Y. Superior Ct. 280; Payne v. Bettisworth, 12 A. K. Marsh, 9 Ky. 427; Smith v. Betts, 16 How. Prac. 251; Fire Ins. Co. v. Butler, 34 Me. 451; Sherwin v. Railroad, 24 Vt. 347; State v. Railroad, 21 Minn. 472; Goodwin v. Holbrock, 4 Wend. 377; Schenectady County Suprs. v. McQuien, 15 Hun 551; Havens v. Bush, 2 Johns. 387; Stephenson v. Kleppinger, 5 Watts. 420; Goldsborough v. Orr, 21 U. S. (8 Wheat.) 217; Logan v. Hodges, 6 Ala. 699; Taylor v. Patterson, 3 Ark. 238; Beryman v.

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Hewitt, 29 Ky. 6 J. J. Marsh 462; McMath v. Johnson, 41 Miss. 439; Robinson v. Harbor, 42 Miss. 795, 97 Am. D. 501; Turner v. Mellier, 59 Mo. 526; Burris v. Schrewsberry Park Land & Improv. Co., 55 Mo. App. 381; Putman v. Mellen, 34 New Hamp. 71; Slocum v. Despard, 8 Wend. 615; Hard v. Sealy, 47 Barb. 428. (4) Where it appears by the terms of the agreement that the performance of one party to precede that of the other, an action can be maintained against him who was to do the first act, although nothing had been done by the other. Meredian Brittania Co. v. Zingenson, 48 New York 247 (8 A. D. 549). (5) One may maintain an action on a contract without having performed a covenant on his part where it goes only to a part of the consideration, and a breach may be compensated in damages, such as a covenant being an independent covenant. Obermyer v. Nichols, 6 Bin. 159 (6 Am. Dec. 439); Quinlin v. Davis, 6 Whart. 169; Adrain v. Lane, 13 S. C. 183. (6) This being a contract for the sale of an interest in lands, must all be in writing. Clearwater v. Tethrow, 27 Mo. 241; Rosenberger v. Jones, 11 Mo. 559; Andrews v. Broughton, 78 Mo. App. 179; Cunningham v. Rousch, 157 Mo. 336.

Mudd & Pettingill and *Smoot, Boyd & Smoot* for respondents.

(1) (a) Oral testimony is competent to show whether an instrument is in escrow. (b) If instrument is in escrow parol evidence is competent to show conditions on which it becomes binding. Wharton's Law of Evidence, sec. 930; Underhill on Evidence, sec. 212, p. 311. (2) And oral testimony is competent to show there was no absolute or final delivery by the party sought to be charged. Shelton v. Durham, 7 Mo. App. 585. (3) (a) A written instrument is never delivered until the obligor is divested of all dominion and control over it. (b) Delivery is essential to, and is

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the crowning act of the execution of a written instrument. There must be mutuality of minds on the delivery and the execution of an instrument as well as to the contents. The courts hold and say that there must not only be a delivery, but an intention to deliver by one having a right to deliver before an instrument becomes binding. Carter v. McClintock, 29 Mo. 464; Ayers v. Milroy, 53 Mo. 516, 521. And the only infallible test of the delivery of an instrument is that the maker parts with the instrument, parts with the dominion and control of it, and it is accepted by the other party. Mudd v. Dillon, 166 Mo. 110, 119; Huey v. Huey, 65 Mo. 689; Hamerslough v. Cheatam, 84 Mo. 1; Abbe v. Justus, 60 Mo. App. 300, 306; Rogers v. Carey, 17 Mo. 232, 234, 235 and 236.

BLAND, P. J.—One Ward made his appearance in Monroe county, Missouri, having in his possession fraudulent abstracts of titles to lands claimed to be situated in the State of Georgia, and designated as head right lands. Relying upon the abstracts, several gentlemen in Monroe county were induced to trade in these lands. J. M. Jayne acquired a deed to the lands and conveyed them to T. R. Senter. Senter, for a valuable consideration, conveyed them to plaintiff who, after receiving his deed, went to the State of Georgia to look up the lands and the title. He ascertained that the abstracts of title were fraudulent and that the head right through which the pretended title was derived had been fraudulently surveyed and the survey declared void and set aside more than one hundred years before the making of the abstracts, as is shown by the following certificate in respect to the title to the lands:

"State of Georgia.

"Office of Secretary of State.

"I, Philip Cook, Secretary of State of Georgia, do hereby certify: That the grants of land to John Hanson in Franklin county, Georgia, one for two thousand

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acres and the other for five thousand acres, both grants in the year 1787, were based on fraudulent surveys and were declared null and void by an act of the General Assembly of Georgia, approved December 28, 1794, as shown by the records in this department.

"In Testimony Whereof, I have hereunto set my hand and the seal of my office, at the capitol in the City of Atlanta, this twenty-second day of June, in the year of our Lord one thousand nine hundred and one and of the independence of the United States of America the one hundred and twenty-fifth.

"PHILIP COOK,
"Secretary of State.

"Seal of Georgia."

After learning that he had no title plaintiff returned to Missouri and made a demand on Jayne and the real estate agents who had figured in the sale of the lands, informing them of the swindle that had been perpetrated. These gentlemen, in compromise and settlement of the matter with plaintiff, entered into the following contract:

"This contract, made and entered into this twenty-seventh day of February, 1901, by and between A. J. Martin, of Clark county, Missouri, party of the first part, and Lee T. Witty, P. G. Carder and T. J. Brumback, of the county of Scotland, State of Missouri, parties of the second part, witnesseth: That the party of the first part for and in consideration of the sum of five hundred dollars to be paid as hereinafter set forth, agrees to make his quitclaim deed to the south one hundred and eighty acres, the north one hundred and sixty acres of the east five hundred acres of a tract of land known as the John Hanson grant, being the lot known as the grant No. 86, and deeded to party of the first part by Thomas R. Senter and wife, said deed to be made to John M. Jayne and wife. This five hundred dollars is to be paid by parties of the second part on or before

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the first day of May, A. D. one thousand nine hundred and one (1901). Party of the first part accepts said five hundred dollars in full of all demands of each and every kind by reason of any and all trades made by him throught parties of the second part. This contract to be deposited with the Farmers' Exchange Bank of Memphis, Mo.

"A. J. MARTIN.
"LEE T. WITTY.
"P. G. CARDER.
"T. J. BRUMBACK."

Plaintiff made the quitclaim deed as agreed and forwarded it to the Farmers' Exchange Bank of Memphis, Mo. The cashier of the bank notified Jayne on several occasions that the deed was at the bank, but Jayne did not call for it. The contract was not deposited with the bank as was agreed, but was handed to Jayne who retained it in his possession and produced it at the trial. Carder, Jayne and Witty, over the objections of the plaintiff, testified that one of the conditions of the contract was, that plaintiff should furnish proof that there was no such land as described in the abstracts and in his deed in the State of Georgia, and that the contract was not to be delivered until this condition was complied with. The verdict was for the defendant. Plaintiff appealed.

Plaintiff assigns as error the admission of parol evidence to vary the terms of the contract. On the erroneous assumption that the contract was to be held in escrow by the bank, the defendants were permitted to offer parol evidence to show that all the terms agreed upon between the parties were not written in the contract. When a written undertaking is deposited with a third party to be held by him until some act is done, or some condition is performed, parol evidence is admissible to show the act and its performance, or to show performance of the condition for the purpose of showing

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that the party suing is entitled to enforce the contract. But parol evidence is not admissible for the purpose of engrafting upon the contract itself an essential condition thereof, or to vary its terms. Such evidence would violate the well-settled rule that parol evidence is not admissible for the purpose of varying, contradicting, adding to or subtracting from the terms of a written contract that is complete in itself. The contract sued on shows on its face that it was not to be deposited with the bank in escrow, but for the convenience of the parties and for the purpose of making the bank the medium through which the deed to Jayne should be delivered and the five hundred dollars paid to plaintiff when he should make and deliver the deed to the bank. Plaintiff complied with the terms of the contract on his part by executing and delivering the deed to the bank to be delivered by it to Jayne and having complied with the contract on his part, the defendants became legally bound to pay him the five hundred dollars. They have failed to perform this obligation and the record shows they have interposed no legal or equitable defense to the plaintiff's demand. The judgment is therefore reversed and the cause remanded with directions to the circuit court to enter judgment for plaintiff for five hundred dollars with six per cent interest thereon from the date of the commencement of the suit to the date when judgment shall be entered. *Reyburn, J.*, concurs; *Goode, J.*, dissents.

GOODE, J. (Dissenting).—The decision of this case, in my opinion, turns principally on the fact that the contract sued on was not delivered to either of the obligees, but was deposited with the Farmers Exchange Bank. If a contract is delivered to the obligee it takes effect at once as a complete contract, no matter what parol conditions were attached to it and these can not be shown. Price v. Ins. Co., 54 Mo. App. 119; Cox v. Parker, 49 N. Y. 107; Brayman v. Bingham, 26 N. Y. 483;

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Miller v. Fletcher, 27 Gratt. 403. But if instead of being delivered to the obligee, a contract is deposited with a third party, it is permissible to show by oral testimony that it was deposited as an escrow and was not to take effect until a certain parol condition was complied with. Shelton v. Durham, 7 Mo. App. 585; Barclay v. Wainwright, 86 Pa. St. 191; Beall v. Poole, 27 Md. 645; Murray v. Stair, 2 Barn. & Cress. loc. cit. 85, 86. This is an entirely different matter from engrafting a parol stipulation on a written instrument. The latter act would change a completed contract which the parties have put in writing; the former simply shows when and on what condition the contract was to become binding.

The majority opinion concedes this may be done, but holds that the contract in question showed on its face that it was to be delivered as a complete obligation. I do not read it that way. All it says on the subject is that "This contract to be deposited with the Farmers Bank of Memphis, Missouri." That bank was not a party to the contract and a mere recital that the contract was to be deposited with it can not be construed as conclusive that the contract was delivered to take effect immediately. It was competent to explain by oral testimony the condition on which it was deposited with the bank. As a specimen of the oral testimony on the subject, I make this extract from the testimony of Lee Witty:

"Q. I will ask you if that contract was ever delivered? A. Never.

"Q. I will ask you if that contract was ever delivered? A. No, sir.

"Q. Why not; you can't state the reason? A. Because Mr. Martin did not fulfill his part of the contract.

"Q. What is it that he was to do before the delivery? A. It was to furnish Mr. Jayne the necessary proof that that was no land in existence. He had in his possession a satchel full of papers showing there was no land there of that description.

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"Q. You say that was to be done before it was to be delivered? A. It was contingent upon it.

"Q. When was it to be? A. Right away. . .

"Q. Mr. Witty, when did you have such a conversation with Mr. Martin? A. That was during the day or evening he was there when this instrument was written."

P. G. Carder testified as follows:

"Q. Was that contract ever delivered Mr. Carder? A. No, sir.

"Q. To Mr. Martin, or anybody for him? A. It was never delivered to my knowledge.

"Q. I will ask you what was to be done before it was delivered? A. Why, Mr. Martin stated that he had information showing that that was no land in Georgia and all that kind of stuff, and Mr. Jayne agreed to pay him $250 of this money.

"Q. In which conversation Mr. Peter Jayne asked if Mr. Martin had furnished that evidence of the failure of the title? A. Yes, sir.

"Q. That is the reason it was made? A. Yes, sir; Mr. Jayne offered right then and there to make it good if he would furnish that information that night; he would give him a check for $100 right that minute; and that I will swear to on any witness stand on earth."

Other witnesses swore to the same effect. Besides, Martin, the plaintiff, wrote a letter after the contract was signed which tends to show that it was not to take effect at once as a settlement of their dispute, as he declared in it that nothing was settled. The letter was as follows:

"February 27th, 1901.

"Mr. E. R. Bartlett.

"Dear Sir: Please do not mention my name in any of your remarks as we are trying to unravel the mystery of the Georgia land deals. We propose to go to the bottom before we quit and you will please keep quiet on this subject. We have not settled any matter yet;

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we are trying to find the guilty parties, which I trust we will before we quit. It is late so I could not see you.

"A. J. Martin."

I think the foregoing evidence was sufficient to send the case to the jury on the issue of whether the contract was finally delivered when it was deposited with the bank, or whether there was anything more to be done before it was delivered. It appears that Martin claimed he had a document which would show there was no such land in Georgia as he had bought—the same document he offered in evidence in this case. Perhaps if he had produced that document, the defendants would have reimbursed him without a lawsuit. At all events, I think it was competent to show by oral testimony he was to do so before the contract was to take effect. The evidence, if believed, required him to make a reasonable showing that he had acquired no title to the land he had bought; and this was a reasonable requirement, when he was demanding repayment of the purchase money. The court adopted that theory and gave several instructions to the jury declaring it as the law of the case, of which the following is an example:

"Gentlemen, although you find and believe from the evidence in the cause that the defendants signed the contract in question and agreed to deliver the same to the Farmers' Exchange Bank, yet if you further believe that it was agreed between the parties, plaintiff and defendants that said contract should not be binding and operative until the plaintiff furnished satisfactory evidence of the falsity of the title to the Georgia lands and that he did not furnish such proof of said false title, then said contract is not binding upon said defendants, and in that event your verdict should be for the defendants and may be in the following form, 'We the jury find for the defendants,' and sign it by your foreman."

It seems to me this case was fairly tried and for that reason I respectfully dissent from a reversal of the judgment.

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DAWSON, Appellant, v. WOMBLES, Admr., etc., Respondent.

St. Louis Court of Appeals, February 2, 1904.

1. **WITNESS: Agent of Deceased Party to Note.** One who acted as agent for the payee of a note, in the transaction leading to its execution, is a competent witness for plaintiff in an action thereon, though the maker of the note is dead, provided the witness has no interest in the suit.

2. **ADMINISTRATION: Affidavit to Demand: Agency.** Section 196, Revised Statutes of 1899 requires that an affidavit to a demand against an estate, which is made by an agent, shall state the fact of such agency, though it does not require the affidavit to contain a statement that the agent had the management of the business out of which the demand grew.

3. **———: ———: Amendment.** If an affidavit to such a demand does not disclose that it was made by the agent of the claimant, the defect may be cured by amendment.

Appeal from Lincoln Circuit Court.—*Hon. E. M. Hughes,* Judge.

REVERSED AND REMANDED.

Martin & Woolfolk, and *Pearson & Pearson* for appellant.

Witness Jno. W. M. Palmer had no interest in the note sued on, was not a party to the note sued on in this cause of action directly or indirectly, therefore does not come within the provision of the statute. R. S. 1899, sec. 4652. Even though the witness, Jno. W. M. Palmer acted as the agent of plaintiff, in receiving the payment of September, 1893, that fact of itself did not disqualify him as a witness. It is the well-settled rule in this state that the agent may testify as to the terms of a contract made by the agent even after death of the other party,

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where the agent is not personally interested in the subject-matter of the contract. The only exception to this rule is where the agent acts for a corporation. Clark v. Theas, 173 Mo. 628; Leahy v. Simpson's Admr., 60 Mo. App. 83; Baer v. Pfaff, 44 Mo. App. 35; Leeper v. McGuire, 57 Mo. 360; Stanton v. Ryan, 41 Mo. 510; Bank v. Payne, 111 Mo. 291; Banking House v. Rood, 132 Mo. 259.

W. A. Dudley and *Norton, Avery & Young* for respondent.

The court committed no error in excluding the proffered testimony of the witness Palmer because: If the rule laid down in Williams v. Edwards, 94 Mo. 447; Newspaper Co. v. Jung, 81 Mo. App. 577; Edwards v. Warner, 84 Mo. App. 200; Banking House v. Ford, 132 Mo. 256; Brimm v. Fleming, 135 Mo. 597; Hollman v. Lange, 143 Mo. 100; Woltemahr v. Doye, 76 S. W. 1053, and other cases holding to the equitable construction of section 4652, R. S. 1899, has been abrogated by the recent decision of the Supreme Court, (Clark v. Theas, 173 Mo. 628) the plaintiff having conceded the doctrine then prevailing is in no position to here charge the court with error. The appellate courts of the State have ever held parties to the position they assumed in the trial court. Hudson v. Railway, 101 Mo. 13; White v. Nelson Mfg. Co., 53 Mo. App. 337.

GOODE, J.—This case is on a note presented by the appellant Jennie L. Dawson against the estate of Jas. R. Palmer, deceased. The note was given July 2, 1887, to Nancy E. Palmer, the mother of the maker, for $515.50, due one day after date and drew interest at eight per cent. It was indorsed by the payee to Jennie L. Palmer December 10, 1888, and was credited with a payment of $22 on the fifth day of September, 1893. Respondent's

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counsel contends it was not clear whether the credit was indorsed in 1891 or 1893; but we must look to the transcript for the facts and the transcript shows it was indorsed in 1893. Shortly after the note was executed, although it had been previously assigned to Jennie L. Dawson (nee Palmer) it was deposited with her father Jno. W. M. Palmer, who was the brother of the deceased Jas. R. Palmer, and both of them were sons of the payee. The purpose of the payee in depositing the note with Jno. W. M. Palmer was to prevent the maker from being pressed for payment. No question is made about appellant's ownership. The note was given as the result of a settlement between Jas. R. Palmer and his mother. The credit on it grew out of an arrangement between Jno W. M. Palmer and Jas. R. Palmer in regard to the funeral expenses of their mother, who died in 1890. It was agreed between the two sons that each should bear one-half of her funeral expenses, but that Jas. R. Palmer should have credit for the half he paid on the note. Jno. W. M. Palmer advanced the entire amount and subsequently Jas. R. Palmer reimbursed him for half of it and at that time the credit was endorsed. The note was filed for allowance August 5, 1902. Notice of its presentation was given July 21, 1902. All the facts in regard to its execution, amount, indorsement to appellant and the credit, were elicited from John W. M. Palmer; but his testimony was afterwards excluded by the circuit court for the reason that he was the agent of his mother in the transaction with Jas. R. Palmer, leading to the giving of the note, and the witness was deemed to be disqualified because his brother is dead. It might be questioned whether Jno. W. M. Palmer was the agent of his mother in the matter at all. He testified that he was no more her agent than his brother's; and he appears to have acted in a clerical capacity in adjusting the account. Be that as it may, it is certain, from the decisions on that point, that he was a competent witness if he had no interest in the

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suit, and we think he had none. The point was directly decided in Clark v. Thies, 173 Mo. 628, and that is the latest adjudication on it. It must control the decision of this case and lead to a reversal of the judgment.

An objection was raised to the affidavit to the demand filed in the probate court on the score that it was made by R. L. Dawson, instead of the claimant himself, and contains no statement that Dawson was the agent of claimant, or that he had had the management of the business out of which the demand originated, or had means of knowing personally the facts necessary to be stated in the affidavit. The statutes require an affidavit to a demand against an estate which is made by an agent, to contain a statement of the fact. R. S. 1899, sec. 196. It does not require the affidavit to contain a statement that the agent had had the management of the business out of which the demand grew, or had means of knowing the verified facts. Those things, we apprehend, may be shown by evidence *aliunde*. The affidavit was defective in not disclosing that it was made by the agent of the claimant, but that defect may be cured by an amendment. Woerner, Administration Law, p. *808; Walker v. Wiggington's Adm., 50 Ala. 579; Chadwell v. Chadwell, 98 Ky. 643.

As to when the payment was credited on the note was a question for the triers of the facts to determine.

The judgment is reversed and the cause remanded. *Bland, P. J.*, and *Reyburn, J.*, concur.

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GIBBS, Respondent, v. ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, February 2, 1904.

1. **RAILROADS: Fires Caused by Locomotives: Circumstantial Evidence.** A plaintiff, suing a railroad company for damages caused by a fire alleged to have been set by sparks from a locomotive, is not to be defeated for lack of positive testimony on the issue, if he proves facts sufficient to authorize an inference that the coals or sparks from an engine of the company were the source of his loss.

2. ———: ———: ———. But where there is no direct testimony to prove the ultimate fact essential to plaintiff's recovery, and circumstantial evidence is relied on, it must be of a kind to fairly point to the existence of the essential fact; the court must consider that the proven facts would tend to produce, in impartial minds, according to common experience, a belief that the unproven, but necessary, fact occurred.

3. ———: ———: ———: **Competency.** In such a case it is competent to show that defendant's engine, had thrown fire far enough to cause such an injury, and, by expert testimony, that well-equipped engines generally would do so.

4. ———: ———: ———: **Setting Aside Verdict.** Where there was no testimony that the train, which passed immediately before the discovery of the fire, threw sparks, nor testimony to what extent defendant's engine ever threw sparks, nor opinions of experts as to whether locomotives emit sparks large enough to fly the distance of the burned building, 50 feet, and where the evidence showed that three stoves in the house had fires in them at the time, and that the house had caught fire previously in some manner other than from engine sparks, and other slight circumstances tending to show the fire was not caused by the engine, the evidence was insufficient to support a verdict for the plaintiff.

Appeal from Crawford Circuit Court.—*Hon. L. B. Woodside*, Judge.

REVERSED AND REMANDED.

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L. F. Parker and *J. T. Woodruff* for appellant.

The demurrer to plaintiff's evidence should have been sustained for two reasons—the first, there was no evidence that the fire was communicated by one of defendant's engines, nor any facts from which such an inference might properly be drawn; the second, his own evidence showed as strong, if not a stronger probability that the fire started from sparks escaping from a "King heater," through a defective flue, and caught in the paper pasted to the studding and rafters in the upper story of the building, or to other combustible matter surrounding the flue. Peck v. Railroad, 31 Mo. App. 123; Sheldon v. Railroad, 29 Barb. 226; Otis Company v. Railroad, 112 Mo. 622; Peffer v. Railroad, 98 Mo. App. 291; Bates County Bank v. Railroad, 78 Mo. App. 330; Railroad v. DeGraff, 29 Pac. 664; 13 Am. and Eng. Enc. of Law, 512; Ireland v. Railroad, 44 N. W. 426; Wheeler v. Railroad, 67 Hun (N. Y.) 639; Railroad v. Morton, 3 Col. App. 155; Railroad v. Blatz, 114 Ind. 661.

Clymer & Clymer for respondent.

(1) The instructions given on behalf of the plaintiff rightly declare the law, and have been approved by the appellate courts of the State. Matthews v. Railroad, 142 Mo. 645; Hutchins v. Railroad, 97 Mo. App. 548. (2) There was sufficient evidence to warrant the submission of the case to the jury, and the court properly refused the instruction in the nature of a demurrer asked by the defendant. Kenney v. Railroad, 70 Mo. 243; Redmond v. Railroad, 76 Mo. 550; Torpey v. Railroad, 64 Mo. App. 382; Walker Bros. v. Railroad, 68 Mo. App. 465. (3) The doctrine is now well established that an appellate court will not disturb a verdict when there is evidence to support it. Neither will it undertake to weigh the evidence, and if there is sufficient testimony to warrant the submission of the case to the

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jury, and proper instructions are given, the verdict is conclusive. Reed v. Ins. Co., 58 Mo. 421; McFarland v. Accident Assn., 124 Mo. 204; James v. Life Assn., 148 Mo. 1; Hull v. Railroad, 60 Mo. App. 593; Fullerton v. Carpenter, 97 Mo. App. 197; O'Mara v. Transit Co., 76 S. W. 680. (4) It must clearly appear that the trial court abused its discretion in passing on motion for a new trial on the ground of the insufficiency of the testimony before an appellate court will interfere. McKay v. Underwood, 47 Mo. 187; Lawson v. Mills, 130 Mo. 170.

GOODE, J.— Plaintiff's testator sued to recover damages for the burning of his house and furniture by a fire alleged to have been ignited by sparks emitted by one of defendant's locomotives. The cause stands now revived in the name of the plaintiff as executrix of her father's estate, he having died since it was instituted. The destroyed house was in the town of Leasburg, on the line of the defendant's railway and stood about fifty feet from the railway track, which, at that point, runs northeast and southwest. The house faced the track and was a story and a half structure, with a porch in front and extending around the corner a short distance on the east side. The testator kept a hotel, and a sign announcing that fact had been fastened to the roof of the porch; but, according to one of the witnesses, who was contradicted by another one, it had blown over and was lying on the roof the night of the fire. It is said the fire was started by a hot cinder from an engine catching against the sign. In the house that night were the deceased owner, Wm. A. Gibbs, his daughter, his son, and a wayfarer who had taken lodging with them. The fire was detected about one o'clock in the morning and at that time was burning on the northeast corner of the porch roof in a patch about one and one half feet wide and from two to three feet long close to, if not in contact with the roof of the house itself.

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Plaintiff had judgment for $900 and defendant appealed.

The proposition relied on for a reversal of the judgment is, that the evidence was insufficient to carry the case to the jury; that is to say, on the facts proven, no inference was warranted that the fire was kindled by sparks from the engine of the train that is said to have passed through Leasburg a few moments before it was noticed.

Some facts in evidence obtrude themselves on the attention as especially important. There were fires in the house early in the evening in three stoves, the cook stove in the kitchen, a heating stove in the room where Mary Gibbs slept and a "King heater" in the room where the men slept. The latter was filled with wood when the family retired at nine o'clock and left burning. The building had caught fire previously in some manner other than from engine sparks. Notwithstanding the small patch of the roof that was aflame when the destructive fire was discovered, and though Mary Gibbs at once aroused her brother and the two tried to save the furniture, the building was so quickly enveloped in flames both inside and outside, that practically nothing of its contents was saved. Two bureau drawers and a feather mattress were gotten out, but those articles were not rescued; for Mary Gibbs testified that before they could be carried to a place of safety, they caught fire and were consumed. These facts argue that the house was on fire inside when flames were discovered on the roof. There was testimony that a mist had fallen during the preceding afternoon and that the night was cold; that only three or four minutes elapsed as the plaintiff swore, between the passage of the train and the discovery of the fire, and in that short interval the roof was blazing over a space three feet long and a foot and one-half wide.

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Equally important is the lack of evidence to make the proof of defendant's responsibility at all satisfactory. There was no testimony that the train which passed immediately before the discovery of the fire threw out sparks, and no evidence tending to prove it did, except the statement of Mary Gibbs that it seemed to be a heavily-loaded train and the fact that the track runs through Leasburg on a rising grade. No witness saw the train. Neither was there testimony adduced to show that defendant's engines frequently, or ever, threw out sparks while on that grade, nor to what extent, if at all, they threw them, how large they were, or how far they flew. No testimony of a positive sort was adduced on that subject, nor opinions of experts as to whether locomotives emit sparks large enough to fly fifty feet and fall still burning. As the want of such testimony is the point on which the decision must turn, it is unnecessary to give a fuller digest of the evidence; for respondent's counsel does not contend there was any proof, either expert or direct, as to the emission of fire by locomotives.

A plaintiff suing a railroad company for damages caused by a fire alleged to have been set by a locomotive, can establish his case by circumstantial evidence that the fire was thus set, and is not to be defeated for lack of positive testimony on the issue, if he proves facts sufficing to authorize an inference that coals or sparks from an engine of the company were the source of his loss. Otis v. Railroad, 112 Mo. 622; Kenney v. Railroad, 70 Mo. 243, 252; Redmond v. Railroad, 76 Mo. 550; Sappington v. Railroad, 14 Mo. App. 86; Alexander v. Railroad, 37 Mo. App. 609; Torpey v. Railroad, 94 Mo. App. 291. In those cases, and in many others, the rule is declared as we have stated it. But the propriety of submitting to the jury the question of the railway company's responsibility has been affirmed in some instances and denied in others in the obedience to another rule of evidence, namely; that where there is no direct

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testimony to prove the ultimate fact essential to a plaintiff's recovery, but proof of collateral circumstances is relied on, such circumstances must be of a kind to fairly point to the existence of the essential fact, to authorize the conclusion that it existed, or there is no case made for the jury to determine. A court must consider the positively proven facts as regards their tendency, according to common experience, to produce a belief in impartial minds that the unproven, but necessary, fact occurred. If the circumstances given in evidence have no tendency of that kind, they do not justify a submission of the cause to the jury; for the latter body's function is to weigh evidence which is relevant, material and possessed of probative force. The law regulates the admission of evidence during trials with reference to its pertinency to the issue as supporting one side of it or the other, excluding whatever has no bearing and receiving all that has. This policy obtains because of the presumption that the force of pertinent testimony, unweakened by admixture with irrelevant matter, will impel the minds of jurors to a fair conclusion about the truth of the issue to be determined. But when the evidence adduced by a party has no tendency, according to the experience and observation of men, to prove the main fact in dispute, the jury should not consider it; because its influence, if it exerts any, must be to stir surmises and conjectures as to the truth, instead of producing a sincere conviction. To say when, in the absence of direct eivdence on an issue, collateral circumstances bear on it and become competent evidence to be weighed by a jury, is a delicate and often a difficult task; and perhaps no where more difficult than in cases in which indirect proof is depended on to show sparks from a railway engine kindled a destructive fire.

In this case we face not only a lack of direct evidence to show sparks from the engine that was heard to go by after midnight, set fire to the decedent's house, but a lack of direct evidence to show sparks escaped

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from it. The precise question for decision, therefore, is: Is it so generally known to persons of average intelligence that a locomotive drawing a heavy load on an ascending grade, throws sparks or cinders fifty feet away and hot enough to ignite the roof of a house if they happen to fall on one, that evidence on the subject may be dispensed with, and the jury assume, from their own knowledge, that this event can and does happen, and use the assumption as the basis for a finding that, in the particular case before them, it did happen? We regard that as the controlling question; though the appellant's counsel have laid more stress on there being several fires in the house and a defective flue; which circumstances, they contend, render it more probable that the conflagration was started inside the building than by coals from an engine. But, in our opinion, it was for the jury to determine whether the fire originated from some interior cause or from coals from a locomotive, if the absence of proof that the locomotive which was heard to pass, threw out fire, can be supplied by an assumption, based on common knowledge, that locomotives do emit fire under similar conditions—in other words, if the action of locomotives in that respect, belongs to the body of information about familiar and customary events, which men generally possess. If it does, the information takes the place of proof, and the case stands as though testimony had been introduced directly proving that the locomotive in question threw burning matter as far as the decedent's house as it passed through Leasburg, or testimony that defendant's locomotives frequently did so. When a fact is so generally known as to obviate the need of evidence about it, the knowledge is equivalent to proof. Lee v. Knapp, 155 Mo. 610. Now there was testimony adapted to induce a belief that the conflagration was of exterior instead of interior origin and the further belief that if it started outside, the burning matter which kindled it did not proceed from the flue of the house. The fire was first

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detected on the roof, about eighteen feet from the flue, and in a direction from it contrary to the wind's movements. The latter circumstance is of slight weight, however; because on blustery nights, the wind often swirls around a chimney and blows sparks contrary to its main course. But these observations pertain to the province of the jury and show that the jury might properly have concluded the fire originated independently of any source in the house. If their right to draw that conclusion is allowed, it follows that they had the right to draw the conclusion that the house was ignited by fire cast from the locomotive the plaintiff heard pass, if they might do so without evidence that a locomotive will cast fire that will ignite a house fifty feet away. The rule of law as to whether or not a jury may take notice of such a fact should be applied, if we can ascertain it accurately as the rule for the decision of the present appeal. It ought to be further remarked that there was no testimony concerning the kind of engines in use by defendant and how thoroughly they were equipped with spark-arresters or appliances to prevent the escape of fire. We think it is generally known that all locomotives in use emit fire to some extent, and that inventors have not perfected any appliance which will entirely prevent the escape of sparks from them. Torpey v. Railroad, 65 Mo. App. supra. The Torpey decision is greatly relied on by the plaintiff's counsel as sustaining his contention that there is evidence enough to support the verdict in the present case. It is not stated in the opinion in that case that evidence was adduced of other fires in the vicinity of Torpey's house set by the railway company's engines about the same time; but such evidence was given by an employee of the company who worked on that section of the track, as we found by procuring the record. We think too, it is known, and may be taken for granted, that a locomotive drawing a heavy train on a rising track, will throw out more fire than at other times. But

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that good engines will emit particles of burning fuel that will fly fifty feet and fall still burning, is a fact, if it be one, which, in our opinion, is not generally known to men of common intelligence and, therefore, must be established by testimony. If we are right about this, it devolved on the plaintiff to show, either that the defendant's engines had thrown fire as far as the destroyed house, or, expert testimony that well-equipped engines would do so. In every cognate decision we have seen in which the evidence, though not directly establishing that an engine set the fire, was held sufficient for the jury, there was testimony of one kind or the other—testimony either that the engines of the railway company had been seen to cast sparks and coals to the alleged distance, or to set out fires that far away, or that this might happen, according to the way engines work. Railway companies have frequently raised the objection to such evidence that it has no tendency to prove the fire which gave rise to the litigation, was started by an engine; but the point was invariably, we believe, ruled against them. See cases first cited, supra; also Railroad v. Richardson, 91 U. S. 454; Railroad v. Gilbert, 52 Fed. 711; Dunning v. Railroad, 91 Maine 87; Frisco Railroad v. Jones, 59 Ark. 105; Jamieson v. Railroad, 42 N. Y. Supp. 915; Brush v. Railroad, Id. 103; Frace v. Railroad, 22 N. Y. Supp. 958. Such decisions certainly determine the competency of evidence of the character stated, if not its necessity; and as evidence is incompetent, strictly speaking, when it relates to matters requiring no proof, the decisions go far toward determining that some evidence is necessary, in litigation like this, to show it was possible for the fire to have been started by sparks from an engine. Indeed they would be conclusive on the point but for the fact that the admission of testimony of the sort mentioned, if it is not strictly competent, might, nevertheless, not constitute reversible error. This cause is unlike those wherein it appeared the fire started on the right of way or very

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close to the track; as it is unlike, those wherein there was no fire in the consumed building from which it could have caught. As to the propriety of testimony to show how far sparks of fire may be dispersed by a locomotive, there is an adjudication by the Supreme Court of New York in Jamieson v. Railroad, supra, and decisions less pertinent, but enough so to be germane, in the Bush and Frace cases, supra.

After we had advanced thus far with this opinion, we chanced to discover a decision on the very point of doubt by our Supreme Court, which, if we had found it sooner, would have relieved us of considerable labor. Campbell v. Railroad, 121 Mo. 341. In discussing the competency of evidence that other fires than the one involved in that action were set out by engines of the company, the court, speaking by Judge MACFARLANE, said:

"The only issue, involving the liability of defendant, was whether the fire was communicated to plaintiff's property directly, or indirectly, by a locomotive engine in use upon its road. Was this evidence admissible as tending to prove that issue? The question was sharply contested on the trial, whether the fire causing the damages did, in fact, originate from one of defendant's engines. The evidence was all circumstantial. It was important, then, to show that there was a possibility that sparks may have been thrown a distance sufficient to reach the building in which the fire originated, and that they contained heat enough to set it on fire. The facts that live sparks were thrown from engines, and did ignite grass, and other combustible materials, would tend to prove the probability that the fire was communicated from an engine. It was not shown that the engine, from which alone the fire could have been communicated, was constructed or manned with more care than all others in use on the road. The admissibility of such evidence was affirmed in Sheldon v. Railroad, 14 N. Y. 223, by a divided court.

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"The court in that case says: 'The competency of this evidence has been directly decided in the English court of common pleas. Piggott v. Railroad, 10 Jur. 571; Aldridge v. Railroad, 3 M. & G. 515. These cases upon this point are well decided. The principle is essential in the administration of justice, inasmuch as circumstantial proof must, in the nature of things, be resorted to, and inasmuch as the jury can not take judicial cognizance of the fact that locomotive engines do emit sparks and cinders which may be borne a given distance by the wind. The evidence was competent to establish certain facts which were necessary to be established in order to show a possible cause of the accident, and to prevent vague and unsatisfactory surmises on the part of the jury.' This ruling was followed without division in Field v. Railroad, 32 N. Y. 339; Webb v. Railroad, 49 N. Y. 421."

The judgment in plaintiff's favor must be reversed for lack of evidence tending to show fire emitted by a locomotive would fly to the roof of the decedent's house while so hot as to ignite the roof.

The defendant's counsel insist the case should not be remanded, as the plaintiff failed to introduce proof enough to establish a cause of action. But we think justice requires us to send it back to the circuit court, and thus afford plaintiff an opportunity to supply, if possible, the omitted proof. There is a difference between an appeal taken by a plaintiff from a nonsuit ordered because he failed to make out his case, and one in which the plaintiff did make it out to the satisfaction of the trial court, but the latter court was in error in so ruling. In the first instance the judgment is right on the record and can not be reversed; while, in the second, it is wrong and must be reversed, and in reversing it the appellate court may remand the cause for a second trial, if that course appears likely to promote a correct disposition of it finally.

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The judgment is reversed and the cause remanded. *Bland, P. J.*, and *Reyburn, J.*, concur.

MATTISON, Respondent, v. HOOBERRY, Appellant.

St. Louis Court of Appeals, February 2, 1904.

REPLEVIN: Executory Contract. An agreement to give plaintiff sixteen bushels of wheat out of defendant's crop, in repayment for that amount borrowed, does not vest title in the plaintiff so as to authorize an action of replevin, where no wheat was set apart for him under the agreement.

Appeal from Texas Circuit Court.—*Hon. L. B. Woodside*, Judge.

REVERSED.

Lamar, Barton & Lamar for appellant.

For the purposes of this case it may be conceded that plaintiff could maintain replevin for his own wheat, even though mingled with and a part of a larger mass. But we contend that under the evidence separation and appropriation were necessary to pass title from defendant, and as title, general or special, is a prerequisite to a replevin suit, this action must fail. O'Neal v. Stone, 79 Mo. App. 285; Potter v. Mt. Vernon Roller Mill Co., 73 S. W. 1005; Lawson on Bailments, sec. 8; Tiedeman on Sales, sec. 12; State v. Wingfield, 115 Mo. 436; Kendall Boot & Shoe Co. v. Baine, 46 Mo. App. 594; Cunningham v. Ashbrook, 20 Mo. 556.

GOODE, J.—This is an action of replevin for sixteen bushels of wheat. The bill of exceptions recites as follows:

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"Now at this day, this cause coming on to be heard, and both parties, plaintiff and defendant, appearing and announcing ready for trial; the plaintiff, to sustain the issues on his part, introduced evidence tending to prove the following facts, to-wit:

"That plaintiff and defendant are neighboring farmers in Texas county, Missouri; that each, in the year 1902, raised, harvested and threshed a wheat crop on his respective farm. That plaintiff threshed his crop of wheat first. That at or about the time plaintiff threshed his wheat crop, defendant borrowed sixteen bushels thereof for consumption, and actually consumed the same. That at the time of said borrowing, he agreed to pay plaintiff sixteen bushels of wheat out of his wheat crop, then grown and cut upon his farm. That a short time thereafter, the defendant threshed his wheat, but failed and refused to pay plaintiff the sixteen bushels thereof so borrowed as aforesaid. That thereupon, this action was brought, the writ issued and served by taking sixteen bushels from a bin of wheat on the farm of defendant, containing more than that amount, all of which said wheat in said bin was a part of the crop grown on defendant's said farm in the year 1902.

"At the close of the evidence, the defendant requested the court to give the following instruction, to-wit:

"The court instructs the jury, that under the evidence, they must find the issues for the defendant.

"Which said instruction the court refused, to which action of the court in refusing said instruction, to the jury, the defendant, by its counsel, in open court, objected and excepted at the time.

"Whereupon, the court, of its own motion, gave the following instruction, to-wit:

"The court instructs the jury that, if you believe and find from the evidence that the defendant borrowed of plaintiff, sixteen bushels of wheat, and agreed to return the same out of his wheat crop then grown and cut

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as soon as the same was threshed; and if you further believe and find from the evidence, that when he threshed the said wheat, he did not return the same, you will find the issues for the plaintiff.

"To which action of the court, in giving said instruction to the jury in favor of the plaintiff, the defendant, by its counsel, in open court, objected and excepted at the time.

"This was the only instruction given."

Replevin is a possessory remedy and for the plaintiff to be entitled to the possession of sixteen bushels of wheat which were in the defendant's possession, it was necessary for the former to show some property, general or special, in the wheat. He showed nothing of the kind, but only that defendant borrowed sixteen bushels of wheat from him and had agreed to repay him by delivering to him that many bushels of defendant's wheat when the latter threshed his crop. Obviously there had been no wheat set apart from the defendant's crop for the plaintiff, nor anything done which showed an intention to transfer the title to any part of the crop to the plaintiff. In what way, we ask, was the ownership of the replevied wheat vested in the plaintiff? Defendant simply broke his promise to repay the plaintiff and the latter could no more replevy unidentified wheat than he could unidentified money to reimburse himself for money he had lent. Schnabel v. Thomas, 98 Mo. App. 197. As the defendant has filed in this court a stipulation renouncing any claim for damages for the wrongful taking of his wheat or to have it returned, the judgment will be reversed and judgment entered here for the defendant. It is so ordered. *Bland, P. J.*, and *Reyburn, J.*, concur.

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FENDERSON, Respondent, v. MISSOURI TIE AND TIMBER COMPANY, Appellant.

St. Louis Court of Appeals, February 2, 1904.

1. **WILLS: Foreign Exemplified Copy: Probate Necessary.** Under sections 4634 and 4635, Revised Statutes of 1899, an exemplified copy of a foreign will, though authenticated according to the act of Congress by the official custodian thereof, is not sufficient to prove a testamentary transfer of title to lands in this State, without an exemplification of the judgment of some court admitting the will to probate.

2. **———: ———: ———: Presumption from Record.** The fact that an authenticated copy of a foreign will appears to have been recorded does not raise the presumption that it was admitted to probate, so as to dispense with evidence upon the subject.

3. **NAMES: Question of Fact.** Where the evidence shows that it was possible to read the name of a grantee in a deed, as either Mack or Mock, it was for the trial court to say whether the former name was intended.

Appeal from Ripley Circuit Court.—*Hon. J. L. Fort*, Judge.

REVERSED AND REMANDED.

J. C. Sheppard and *Dinning & Hamel* for appellant.

Plaintiff failed to prove title in fee or otherwise in himself to the land in his petition described for two reasons, viz.: (1) The deed from Jacob Van Wormer to Charles C. Mock vested the title to said premises in said Mock. This is a link in plaintiff's chain of title, Next plaintiff introduced a deed from Charles C. Mack to Robert Jennison. This was introduced over the objections of appellant. There was no evidence that

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Charles C. Mack was Charles C. Mock. On this question not a scintilla of evidence was introduced. M-o-c-k and M-a-c-k are not *idem sonans.* Names are said to be *idem sonans* if the attentive ear finds difficulty in distinguishing them when pronounced: The names M-o-c-k and M-a-c-k do not have such a similarity of sound, when pronounced, that a difference would not be observed by an attentive ear. M-o-c-k and M-a-c-k do not sound at all alike, and it was not shown by common usage, a different pronunciation of the word M-a-c-k when used as a proper name. Geer v. Lumber & Mining Co., 134 Mo. 85; Wheeler v. Weaver, 93 Mo. 432; Robson v. Thomas, 55 Mo. 582; Simonson v. Dolan, 114 Mo. 179; Chamberlain v. Blodgett, 96 Mo. 482; Black v. The State, 57 Ind. 109; Com. v. Donovan, 95 Mass. 57; Weber v. Ebling, 2 Mo. App. 15; People v. Amenn, 76 Ill. 188; State v. Havely, 21 Mo. 498. (2) The copy of the will of William Armstrong, which was introduced in evidence over the objections of appellant, did not vest title to the land in question. A copy of a will, or the record thereof, when recorded, is not admissible in evidence. A will or a copy of the record thereof, must be duly probated by the court of the domicile of the testator having jurisdiction to take proof and probate wills, and the probate of a will in a State other than where the land devised is situated must be made according to the laws of the State wherein the land is situated. Keith v. Keith, 97 Mo. 223; Gaines v. Fender, 82 Mo. 497; Van Syckel v. Beam, 110 Mo. 589; 1 Am. Law of Administration (Woerner), 2 Ed., sec. 226; Graves v. Allen, 100 Mo. 300; Graves v. Ewart, 99 Mo. 17; Cabanne v. Skinker, 56 Mo. 357; Story on Conflict of Laws, sec. 474; McComack v. Sullivan, 10 Wheat. 192 and cases cited; Lucas v. Tucker, 17 Ind. 41; Jarman on Wills, 1; 1 Red. on Wills (3 Ed.), 398; Whart. on Conflict of Laws, 587.

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Thomas F. Lane for respondent.

(1) The evidence in this case clearly shows that plaintiff was, at the date of the alleged trespass, the owner in fee of the land described in this petition, hence he is entitled to recover herein. The defendant's first point of attack on the record title of plaintiff is a deed from the common source of title Jacob Van Wormer to Charles C. Mock or Mack, dated February 12, 1862, and recorded in book "I." This is a warranty deed in due form. And every presumption of law tends to support its validity. The question as to whether the names Mack or Mock are *idem sonans* does not enter into this case in view of the record as affected by stipulation printed on page 2 of respondent's brief; the judgment of the trial court sitting as a jury is conclusive on the finding of facts. We deem it unnecessary to cite many authorities to support this elementary principle. (2) It is not necessary in order to the admission of the copy of the will that such will shall have been admitted to probate in this State or recorded in said office of such court. The will in this case which was made in Kentucky was held admissible in evidence over the objection that its admission to probate in Kentucky was not sufficiently authenticated. The probate of the will in another State is a judicial proceeding, to the record of which full faith and credit is to be given, when authenticated as required by the act of Congress. Bradstreet v. Kinsells, 76 Mo. 63; Drake v. Curtis, 88 Mo. 644. (3) Under the laws of this State the will could not be filed and recorded in the probate court until proved as required by statute. Section 4632, R. S. 1899. And the probate courts having original exclusive jurisdiction in the matter of wills their judgments can not be attacked collaterally, and their judgments are attended by every presumption as to their force and validity as courts of general jurisdiction. Banks v. Banks, 65 Mo. 432; the fact that a foreign court uniformly exercised jurisdic-

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tion over a subject is in the absence of the proof to the contrary evidence that the jurisdiction is lawful. Robertson v. Staed, 135 Mo. 135; Allen v. Sales, 56 Mo. 28. (4) Every presumption is indulged in favor of the regularity and validity of a judgment. Kane v. McCowan, 55 Mo. 181; Bearden v. Miller, 54 Mo. App. 199. Decrees of courts of sister States are presumptively valid, and this presumption must prevail until overcome by proper proof. Athony v. Rice, 110 Mo. 223, 19 S. W. 423. (5) The courts of Missouri do not take judicial notice of the laws of our sister States, but in the absence of proof to the contrary, they will be presumed to be the same as our own. Selking v. Hebel, 1 Mo. App. 340; Conrad v. Fisher, 37 Mo. App. 371; State v. Baty, 166 Mo. 564.

GOODE, J.—Action for damages for trespass on lands by cutting and removing trees from it. The land was wild and not in the actual possession of any one; but plaintiff asserts the right to maintain this action by virtue of the constructive possession which he says he had as owner of the fee. Both parties claim under Jacob Van Wormer as the common source of title; the plaintiff under a warranty deed executed by said Van Wormer in his lifetime to Charles C. Mack and subsequent transfers of the title to the plaintiff; the defendant under a quitclaim deed from the heirs of Van Wormer. In plaintiff's chain of title is the will of William Armstrong. This will was executed February 22, 1886, in Bradford county, Pennsylvania, where Armstrong resided. It is an essential link in plaintiff's title and the only question of moment in the case is whether or not the certified copy of the will from the office of the register of wills of Bradford county, which was introduced by the plaintiff, was sufficient evidence to show that the title to the land passed by the will to Emeline Armstrong, the devisee. The document introduced comprises a copy of the will of William Armstrong with

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the attesting clause, signed by two witnesses, and the certificates of Wm. J. McCabe, register of wills of Bradford county and A. C. Fleming, president judge of the court of common pleas or orphan's court for Bradford county. The execution and attestation of the will complied with the statutes of this State, and the authentication of the copy complies with the act of Congress. But the plaintiff offered nothing, as said, except an exemplification of the will itself, with the attesting clause, and the certificate of the register that he had compared the copy with the original on file and of record in his office and found the same to be a true copy of and transcript of the original record. What is lacking is an exemplification of the record of the probate of the will in the proper court of Bradford county, Pennsylvania, if it was ever proved. The defendant insists that for the will to be operative as a conveyance in plaintiff's chain of title, it was necessary for it to be proved, and that for the record introduced in evidence to establish this necessary link in his chain of title, it was necessary to have an exemplification of the decree or judgment, authenticated according to the act of Congress. This point must be granted. Our statutes provide that any person owning real or personal estate in this State may devise or bequeath such property by last will, executed and proved if real estate be devised, according to the laws of this State; or if personal estate be bequeathed, according to the laws of this State or of the country, State or Territory in which the will was made. They further provide that authenticated copies of such wills, *and the probate thereof,* shall be recorded in the same manner as wills executed and proved in this State, and shall be admitted in evidence in the same manner and with like effect. R. S. 1899, secs. 4634, 4635. For aught that appears, the will in question may have been on file in the office of the register of wills in Bradford county, Pennsylvania, but never have been proved in a court of competent jurisdiction, to be the will of the testator Arm-

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strong; and no one will contend that a will can pass title to land until it is proved. The statutes just cited determine that proposition; which has, moreover, been the subject of adjudication.

In Keith v. Keith, 97 Mo. 223, it was said that a will, to be of any validity as a transfer of title to land, must be executed, attested and proved in the manner prescribed by the laws of the State where the land is located. That remark was made in reference to a foreign will. In the same connection the opinion says in effect, that though the law of this State dispenses with proof here of a foreign will which has been proved in the foreign forum according to our law, our law must be complied with in order to give the foreign will the force and effect of a proved domestic will; citing McCormick v. Sullivant, 10 Wheat. 192; Cabanne v. Skinker, 56 Mo. 357.

In Lewis v. St. Louis, 69 Mo. 595, an exemplification of a will executed in Wisconsin, and of its probate in Grant county in that State, was admitted in evidence over the objection of the defendant, that the will had not been recorded in this State. The precise point determined was that if it had been duly executed and proved in Wisconsin it could be received in evidence in this State, although not recorded here. The same thing was decided in Drake v. Curtis, 88 Mo. 644.

In Gaines v. Fender, 82 Mo. 497, it was ruled that a foreign will need not be proved nor recorded in this State to make it competent evidence, provided it was duly executed and proved in the State of its execution. The objection was made in that case to the record offered in evidence, that there was no proof of the probate of the will in Kentucky, the State where the testator executed it. This was ruled against the appellant; not on the ground that such probate in Kentucky was unnecessary; but on the ground that the exemplification offered in evidence was a properly authenticated copy of

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the record of the judgment of the Kentucky court establishing the probate of the will.

Charlton v. Brown, 49 Mo. 353, which the plaintiff invokes as an authority in favor of the propriety of receiving in evidence the record in question, is an authority against his position. The will offered in the case was executed in Missouri, and the objection to its admission was that the exemplified copy of the record of the probate, which was offered, did not embrace the testimony given by the witnesses to the will when it was proved. But the record showed the probate of the will, and this was held sufficient and that it was unnecessary to insert in the exemplified copy of the judgment of probate, the evidence on which the judgment was rendered.

None of the decisions lend countenance to the proposition that an exemplified copy of a foreign will, though authenticated according to the act of Congress by the official custodian of wills in the foreign jurisdiction, is sufficient to prove a testamentary transfer of title to lands in this State, without an exemplification of the judgment of some court admitting the will to probate. To so hold would be to disregard the express words of the statutes, which declare that authenticated copies of foreign wills and the probate thereof shall be admitted in evidence, and that any person owning real estate in this State may devise it by will, executed and proved according to the laws of this State.

Error was committed in the reception of the record of the will offered by the plaintiff as sufficing to show a transfer of title, and the judgment must be reversed and the cause remanded to allow the plaintiff to complete, if possible, his proof.

We will attend a moment to the plaintiff's argument that the certificate to the copy of the will shows it had been recorded and that it could not be recorded until it was proven. This is a *non sequitur*. Certainly, we can not presume there was judicial action by the

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proper court in taking proof of this will, and dispense with evidence on the subject, merely because the will happens to be recorded.

An objection was made against the admission of a deed executed by Charles Mack, on the ground that the deed from Van Wormer under which Mack claimed, was made to Charles Mock. As to this point, suffice to say, that the evidence shows it was possible to read the name of the grantee in the deed Van Wormer made as either Mack or Mock, and as the letter "a" is often carelessly formed in writing so as to resemble "o," we think it was for the trial court to say whether or not the grantee intended was Charles Mack.

The judgment is reversed and the cause remanded. *Bland, P. J.*, and *Reyburn, J.*, concur.

STATE OF MISSOURI, Respondent, v. MILLER, Appellant.

St. Louis Court of Appeals, February 2, 1904.

1. **WINE-GROWER: Definition.** The meaning of the term "wine-grower" as used in section 3015, Revised Statutes of 1899, is a person who manufactures wine from grapes grown on his own premises.

2. ———: **Misdemeanor.** One who sold without a dramshop license, in less quantities than one gallon, wine made on his own premises from grapes, only part of which were grown on the premises, is guilty of a misdemeanor under section 3014, Revised Statutes of 1899.

Appeal from Greene Criminal Court.—*Hon. J. J. Gideon*, Judge.

AFFIRMED.

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G. D. Clark and *Perry T. Allen* for appellant.

(1) Defendant contends that under the agreed statement of facts the defendant should have been discharged because the facts set forth in said agreed statement shows the defendant to be a "wine-grower" and the wine sold to be of his own production or make. The agreed statement of facts does not show that the wine sold was any part of the wine produced from grapes not grown upon the premises. 63 Mo. 403; 55 Mo. 67. (2) We further contend that inasmuch as wine can not be grown on any vine but must be grown by a system of fermentation, never becoming wine unless fermented, that the term "production" used in section 3015, R. S. 1899, meaning to make or manufacture, gives the person who produces or makes the wine the right to sell upon his own premises in any quantity.

GOODE, J.—The defendant was convicted of the offense of selling intoxicating liquors in less quantity than one gallon, without having a license as provided by the statutes. The case was submitted to the court on the following agreed statement of facts:

"That the defendant, Jacob B. Miller, now lives at 1028 West Elm St. in the city of Springfield, Greene county, Missouri; that he has lived at that place for the past several years; that the lot on which he lives is 60 by 140 feet; that he has growing on said lot 16 grape vines; that during the past year he has manufactured 100 gallons of wine; that this wine is manufactured by the defendant at the above place, and in the manufacturing of it, he used some grapes raised on the said 16 vines, and grapes bought by the defendant from other parties, who raised them in Greene county; that some of this wine has an orange flavor, made so by the defendant putting in the wine orange peelings; that some of it has a lemon flavor, and made so by putting in the

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wine lemon peelings; that out of this wine so manufactured by the defendant, he, the defendant on the 26th day of November, 1901, at the county of Greene and State of Missouri, at said No. 1028 West Elm St., in the city of Springfield, it being the place where said wine was made, did sell said wine in less quantity than one gallon, to-wit, one quart of wine to one D. W. Baker:

"It is further admitted that the said Jacob B. Miller, did not at any time have a dramshop license.

"It is further agreed that said wine was gauged by the United States Gauger and was found to contain two per cent alcohol."

The point made against the conviction is, that under the agreed statement of facts it appears the defendant was a wine-grower; that the wine sold was of his own production, and he was privileged to sell it under section 3015 of the Revised Statutes of 1899. That statute gave the defendant the right to sell wine of his own production in any quantity on his own premises. But the agreed statement of facts tends to prove that the wine he sold was not of his own production; that is, pressed from grapes grown on his own premises. The agreed facts are that he had sixteen grape vines and manufactured 100 gallons of wine last year; that he used some grapes grown on the sixteen vines and other grapes bought from other parties in Greene county. Certainly it is a legitimate conclusion from those facts that he was not a wine-grower in the sense of the statute, if the statute means by that designation a person who manufactures wine from grapes grown on his own premises. and we think it does. That view corresponds with the definition of the word "wine-grower." Standard Dict., p. 2068; Century Dict., p. 6939. Defendant's counsel argue that it is sufficient to exculpate the defendant that he manufactured the wine, whether from grapes grown by himself or by somebody else; but we think their position is untenable. Section 3014 covers that contingency, by providing that wine or beer may be sold in

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any quantity not less than ten gallons by a person holding a wine or beer house license and that liquor may be sold in quantities not less than one gallon at the place where made, but not drunk on the premises. The purpose of section 3015 was to create an exemption in favor of persons who raise grapes on their own premises and make wine from them. State v. Jaeger, 63 Mo. 403.

The judgment is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

KALBACH, Appellant, v. MATHIS et al., Respondents.

St. Louis Court of Appeals, February 2, 1904.

1. **ALTERATIONS: Explanatory Evidence.** Alterations in a deed are presumed to have been made innocently and before acknowledgment and delivery, but if there are suspicious circumstances apparent on the face of such an instrument, offered in evidence, the court may let in testimony as to when and under what circumstances the alterations were made.

2. ———: ———. Where one description in a sheriff's tax deed, in the column for the range number, showed an erasure with the number "7" inserted on the abraded surface, and the other description showed an erasure of the word "five" and the word "seven" written above it, both alterations in different ink from the rest of the instrument, and the clerk's entry of the acknowledgment, taken in open court, described the land as in range 5, it was proper for the trial court to take evidence bearing upon when and how the alterations were made.

3. ———: ———. The evidence is examined and the finding of the chancellor that the alterations were made after delivery, and his ruling excluding the deed from evidence, held to be correct.

4. **WASTE: Equitable Owner: Injunction.** An equitable owner of land may have relief by injunction against waste.

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5. ——: ——: ——. Where, in such an action, the plaintiff had acquired his interest by purchase under execution, having a deed with an erroneous description of the land, where all the proceedings were regular with proper descriptions up to and including the judgment, but the execution was not in evidence, this was not enough to show that plaintiff had purchased by a correct description and a judgment against him is affirmed.

Appeal from Butler Circuit Court.—*Hon. J. L. Fort,* Judge.

AFFIRMED.

E. R. Lentz for appellant.

(1) All the evidence goes to show that the defendants were the rankest kind of trespassers; that they were without authority of any kind to cut or take away the timber. There is not a particle of testimony tending in the remotest degree to establish such right. The alleged change in the description in the deed could only prejudice some one in privity with Milo P. Marble, the admitted owner of the land prior to the tax sale, or some of the other persons who were made co-defendants with him in the tax suit. As defendants made no pretense of showing any such privity of interest or title, they were not harmed by the alleged changes in the deed, and could not be heard to question the validity of the deed as evidence of the plaintiff's title. Holladay-Klotz Lumber Co. v. Moss Tie Co., 89 Mo. App. 560. (2) The law presumes that the alterations in the deed were made anterior to, or contemporaneous with, the execution and delivery of the deed; and the burden of establishing that the alterations were made afterward rests upon the defendants. Mathews v. Coalter, 9 Mo. 705; Paramore v. Lindsley, 63 Mo. 66; Halton v. Kemp, 81 Mo. 665; Stillwell v. Patton, 108 Mo. 352; Bunett v. McCluey, 78 Mo. 687; Wilson v. Hayes (Minn.), 4 L. R. A. 200. (3) The presumption that the alteration was made anterior to or contemporaneous with the execution

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and delivery of the deed, is not overcome by suspicious circumstances appearing on the face of the instrument. Grimes v. Whitesides, 65 Mo. App. 1. (4) The entry of acknowledgment indorsed on the deed executed by the sheriff is regular and in proper form. The mistake of the clerk in making his record entry will not affect the deed. Scruggs v. Scruggs, 41 Mo. 245.

William N. Barron for respondents.

(1) In every case it devolves upon the plaintiff to make out his case by proof and until he does so the defendant can remain passive if he chooses. Robertson v. Railroad, 152 Mo. 391; Marshall v. Ferguson, 94 Mo. App. 182; 5 Am. and Eng. Ency. Law (2 Ed.), 39-41. (2) The material alteration after delivery of a deed by one beneficially interested who has custody thereof is fatal to the instrument. Hord v. Taubman, 79 Mo. 102. (3) If the alteration or interlineation is of a suspicious character, the chancellor or jury would, on the face of the paper without additional proof, be authorized to decide against the presumption that the alteration was made before or contemporaneous with the signing. Grimes v. Whitesides, 65 Mo. App. 3. (4) In equity cases and particularly where the evidence was taken orally, the appellate court will not interfere with the finding of the trial court upon disputed questions of fact, unless such finding be manifestly against the preponderance of the evidence. Southern Commercial and Savings Bank v. Koeln, 60 Mo. App. 82; Ford v. Phillip, 83 Mo. 528.

GOODE, J.—The purpose of this suit is to enjoin the defendants from cutting timber on the north half of the southeast quarter of section 2, township 25, range 7, east, in Butler county. The plaintiff alleged that he was the owner of the land. His chain of title consists of a tax deed executed by the sheriff of Butler county

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to Aaron Mast, pursuant to a sale under a judgment for taxes against Milo P. Marble, and a subsequent warranty deed from Mast to the plaintiff. The judgment for taxes was rendered May 9, 1890, at which time Marble held the title to the land, as was admitted. The defendants asserted a right to cut and remove timber from it by virtue of a parol license from Marble.

At the trial the tax deed was offered in evidence by the plaintiff, but was excluded by the court on the ground that it had been altered in a material respect by Mast, the grantee, after its execution, acknowledgment and delivery. The result was that plaintiff's suit failed and he appealed, assigning for error that the court wrongly excluded the deed.

The deed has been submitted, with the consent of both parties, for our inspection. We find that it was executed on a blank form of the kind in common use in conveying lands sold under judgments for taxes. In the first description of the land that occurs in the deed the section, township and range appear in figures in parallel columns. In the column for the range number the figure "7" appears; but it is apparent at a glance, that there has been an erasure of some figure previously there and "7" inserted on the abraded surface. The marks of the tool by which the erasure was made are visible and the figure 7 appears to be in blacker ink than the rest of the deed. The second description, to-wit; the granting clause, has the range written out in full and it was originally written as "five, east." The word "five" was erased by an ink line drawn across it and the word "seven" written above it in much blacker ink than the other portions of the deed.

The clerk's entry of the acknowledgment taken in open court under date of November 15, 1890, is contained in the bill of exceptions, having been introduced by the defendants, and is as follows:

"Now comes Samuel Gardner, sheriff of this county, and in open court, before the judge thereof,

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acknowledges the execution of the deed as such sheriff to A. Mast, for the real estate described in said deed as follows, to-wit: the n. 1-2 of the s. e. 1-4 of section 2, township 25, range 5, which was sold at this term of court as the property of Milo P. Marble, Silas B. Jonas, O. P. Hedges, Frank Titus, J. A. Forbes, Charles P. Fuller and Western Mortgage & Investment Co., by virtue of a special execution issued from the office of the clerk of this court upon judgment for taxes in favor of the State of Missouri, to the use of Henry Turner, collector, etc., and against said Milo P. Marble, Silas B. Jonas, O. P. Hedges, Frank Titus, J. A. Forbes, Chas. P. Fuller and Western Mortgage & Investment Co., defendants. It is ordered that the clerk of this court indorse upon said deed a certificate of said acknowledgment under his hand and official seal."

That acknowledgment, it will be observed, gives the range as five instead of seven, thus corresponding with the deed as it was first written.

The law is that alterations in instruments of this character are presumed to have been inserted innocently and before acknowledgment and delivery. But if there are suspicious circumstances apparent on the face of an instrument offered in evidence, the court may let in testimony, to be weighed by the triers of the facts, as to when the alterations were made and whether they were made by a party beneficially interested, subsequent to acknowledgment and delivery. The trial court took evidence on this question and we think properly; as the apearance of the instrument excites suspicion as to the validity of the alterations and, therefore, called for an explanation. Paramore v. Lindsley, 63 Mo. 66. Besides the entry of the acknowledgment, two witnesses were introduced who testified as experts that the alterations were made in the handwriting of the grantee, Aaron Mast. Samuel Gardner, who executed the deed as sheriff, it was put on the stand and testified that the manuscript portions of the deed as originally written,

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were in the handwriting of Geo. W. Register; but that the alterations were in a different handwriting, were not made by his authority as sheriff, and he believed they were made since the delivery of the deed. Mast testified that he did not make the alterations and knew nothing about them. The purport of his testimony was that the deed was in the same condition it was when he received it. On this evidence the court, as trier of the facts, refused to admit the deed in evidence.

This is an equity case and we are at liberty to review the evidence; but it is customary in such instances, to defer somewhat to the opinion of the trial judge, and we do not feel that the weight of the evidence is so strongly against the finding made below that we ought to reverse it. It is hard to escape the conviction that the alterations were made after the acknowledgment and delivery of the deed, in view of the evidence; especially as the entry of the acknowledgment corresponds with the deed as originally written in regard to the range number. We will accept the finding of the learned trial judge as correct.

This is not an action for damages for trespass, but is a suit to prevent waste by an injunction. A legal action for damages can be maintained only by the party in possession or by the holder of the legal title who has constructive possession. With the sheriff's deed out of the evidence, the legal title can not be established in Kalbach, the plaintiff, and he is not in possession of the land, which is wild. He could not, therefore, maintain a legal action for trespass. But we apprehend that the equitable owner of the estate may have relief by injunction against waste. Webb v. Boyle, 63 N. C. 273. If all the proceedings leading up to this sale were regular, plaintiff would be entitled to a corrected deed, we think. Ozark Land & Lumber Co. v. Franks, 156 Mo. 673; Dollarhide v. Parks, 92 Mo. 178. He may be the equitable owner of the land and only lack the legal title because

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of a mistake in the description in the tax deed. This is suggested by the judgment for taxes rendered in the suit against Marble. That judgment was copied into the bill of exceptions and is against the tract of land in controversy, which is described as in range seven. It is manifest, therefore, that Marble's land was in range seven and that the tax proceedings were against the land by its correct description, the error in describing it having occurred subsequent to the judgment. On this account we were inclined to favor the plaintiff's suit; but on reflection have concluded we may not do so because, perchance, there may have been a mistake in the description in the execution, levy and notice of sale. If the execution misdescribes the lands, plaintiff would, of course, not be entitled to a corrected deed; for the execution must follow the judgment and if it fails to do so, no title passes by the sale. The execution is not in the record, and as the presumption is in favor of the correctness of the decision below, in the absence of an affirmative showing of error, we can not grant the plaintiff relief.

The judgment is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

JAMISON, Respondent, v. CONTINENTAL CASUALTY COMPANY, Appellant.

St. Louis Court of Appeals, February 2, 1904.

1. **ACCIDENT INSURANCE: Pleadings: Sufficiency of Petition.** In an action on an accident insurance policy, where the petition alleges that the insured sustained bodily injuries through external, violent and purely accidental causes, resulting in death, in that while he was employed as a bridgeman for a railway company, he "was struck upon the head with some hard substance, inflicting a mortal wound," the language was precise and full enough to constitute a good averment that the insured met death by an "external, violent and purely accidental cause."

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And, though the averment is followed with the allegation: "A more particular description of the circumstances of said accident can not here be given because they are to the plaintiff unknown," that does not make the petition insufficient.

2. ———: Burden of Proof. In an action on an accident insurance policy, where the evidence showed an accidental death of the insured, and the defense relied upon was that the liability was only for the minimum rate fixed by the policy, because the deceased met his death from "unnecessary exposure to danger or to obvious risk of injury," as conditioned in the policy, the burden was on the defendant to show that the insured met his death in a way that would bring into operation the minimum indemnity clause.

3. ———: Unnecessary Exposure. The evidence showed that deceased, who was stationed at a bridge to flag trains approaching it, went to his station one night and the next morning his body was found a short distance from the track. Blood stains were traced from there to the track where his hat was found on the track cut in two. Just before his death and while in a semiconscious state, deceased stated that he had been struck by the train while asleep. *Held*, the deceased may or may not have been exposing himself to unnecessary danger, as defined by the terms of the policy, and it was a question for the court sitting as a jury to determine whether he was or not.

4. ———: ———: Declarations of Insured. Where the evidence relied on by the defendant to show that the deceased met his death from having gone to sleep on the track where he was struck by the train, were the statements of deceased made just before his death, when in a semiconscious condition, in answer to suggestive questions which had to be repeated, so that it was doubtful if he understood what was said to him, such statements do not establish the fact so conclusively as to make it the duty of the appellate court to determine it contrary to the finding of the trial court.

Appeal from Texas Circuit Court.—*Hon. L. B. Woodside,* Judge.

AFFIRMED.

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L. D. Grove for appellant.

(1) The petition does not state facts which will warrant the judgment rendered in this case; in this, that it fails to state that the mortal wound from which death resulted, was received from accidental causes, but disclaims all knowledge as to how the wound was received. Laessig v. Protective Association, 169 Mo. 280; Bank v. Fisher, 55 Mo. App. 53. (2) The case was tried upon the theory that the burden of proof was on the defendant. This is the theory of the plaintiff in his pleadings, and seems to have been the theory of the court, as appears from this record. This was an erroneous theory. When there are facts proven, which reasonably account for occurrence, all presumptions of fact which could otherwise have been indulged in, are removed. Brownlow v. Wallace, 61 Mo. App. 124. (3) There is no presumption of law, that the wound causing death in this case was from accidental causes, from the fact alone, that he was struck by a moving train, as was assumed in this case. The insured was bound by the condition of his contract; that he would not unnecessarily expose himself to danger, under penalty of forfeiting rights to the larger amount named in the policy. Overback v. Ins. Co., 94 Mo. App. 453. (4) If the insured went to sleep on the railroad track, knowing that trains were likely to pass over the road, that act forfeited the right to receive—in case of being killed—more than one hundred dollars; this was the terms of his contract. If insured unnecessarily placed himself so near a moving train, as to be hit thereby, this act was a forfeiture of his right to recover more than one hundred dollars, if killed thereby, for he had so agreed in his contract. Van Back v. Railroad, 171 Mo. 338; Errickson v. Railroad, 171 Mo. 647.

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Lamar, Barton & Lamar for respondent.

(1) Appellant complains for the first time in this court that plaintiff's petition does not state that the mortal wound was accidentally inflicted. This contention is not well founded, for the following reasons: (a) The petition uses the exact language of the policy, brings the injury within its terms, and follows an approved form. VanCleave v. Union Cas. & S. Co., 82 Mo. App. 672. (b) Defendant introduced evidence upon this issue, tried the case as though the allegation had been made, and can not now complain of its absence. Sawyer v. Railroad, 156 Mo. 476 *et seq.;* R. S. 1899, secs. 659 and 865. (c) This allegation may, at least be clearly inferred from what is stated, and after verdict this inference will be made. McDermott v. Claas, 104 Mo. 14. (d) The answer "admits that Oscar Jamison received a wound in his head which caused his death, as alleged in the petition;" states that the injury was produced by a train striking him, and refers to the occurrence as an accident. By so doing, it expressly aids the petition on this point. Bliss on Code Pleading, sec. 437; Summers v. Fid. Mut. Aid Assn. 84 Mo. App. 609. (2) Complaint is also made that "the petition does not state sufficient facts to warrant a judgment beyond the sum of one hundred dollars." We suppose this is intended to assert the rule that plaintiff's petition should have negatived the limitations and exceptions in the policy, as to the matters set up in the answer. It is useless to cite authorities to show the fallacy of this position. Meadows v. Ins. Co., 129 Mo. 90. (3) Complaint is also made that "the case was tried upon the theory that the burden of proof was on the defendant." In the first instance, unquestionably, the burden was on the plaintiff to establish the accidental death, unless it was admitted by the pleadings, which we think was done. DeZell v. Fid. & Cas. Co., 78 S. W. 1118. (4)

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An unintentional and involuntary exposure will not help defendant. Deceased must have known of the danger and intentionally exposed himself to it. Niblack on Ben. Soc. & Acc. Ins., 708; 1 Cycl. Law and Proc., 300 The burden of proving the limitations and exceptions set up in the answer, is upon defendant. 50 Am. St. Rep. 427 and note; 1 Cycl. of Law & Proc., 290. After verdict every reasonable inference will be drawn in favor of the judgment. (5) Bearing in mind the nature of this exposure and the burden of proof we will consider the evidence upon this issue. Its unsatisfactory character is demonstrated by the fact that defendant in this court is unable to say whether deceased's negligence was sleeping on or standing too near the track, and it takes this double position. The fact that his body was found mangled near a railroad track is not sufficient to establish this exposure and the other evidence does not, in any reasonable way, point to it. Much less with that certainty authorizing the court to declare as a matter of law that deceased did so expose himself.

GOODE, J.—The plaintiff sued an accident insurance company, on a policy of insurance to recover one thousand dollars. The policy was taken by Oscar Jamison, in favor of his father, the plaintiff. The contract contained, among other things, a stipulation that the company would pay to the plaintiff one thousand dollars if the insured, during the life of the policy, should meet death by external, violent and purely accidental means. The deceased was employed by the Gulf, Colorado & Santa Fe Railroad Company and was killed, presumably, by being struck by a train. He was a bridge carpenter, but had been detailed to flag trains and see that their speed was reduced to four miles an hour before they passed over the company's bridge No. 266. At six o'clock in the evening of April 15, 1902, he left Sanger, a station on the railroad in the State of Texas, with orders to go to the bridge and flag all trains

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that came along. He was not seen again until the next morning and was then found lying about fifty feet from the west side of the bridge and twenty feet south of it. He had a large wound in the back of his head, bruises on the left side of it and on his right leg between the hip and the knee. There was evidence to show that he tottered to that spot after being struck by the train. Blood was detected on the ties near the bridge and footprints and blood stains were traced from the track to where he lay. His lantern was near the ties and his hat on the track cut in two.

The answer, besides a general denial, pleaded that the deceased was sent to the bridge to flag trains, which duty required him to keep awake and to stand on the east side of the bridge; but that he unnecessarily exposed himself to danger and to obvious risk of injury by going to sleep on the track, or so near the track as to be struck by a passing train.

1. The point is made against the petition that it does not state the mortal wound was received by accident, but on the contrary disclaims any knowledge of how it was caused. The petition states that on the day mentioned the "insured sustained personal, bodily injuries, through external, violent and purely accidental causes within the terms of said policy; which injuries solely and independently of all other causes, resulted in the death of said Oscar Jamison within ninety days of the accident, to-wit, within two days thereof, in that while he was employed as a bridgeman, as aforesaid, he was struck upon the head with some hard substance inflicting a mortal wound, from which he, Oscar Jamison, died on the —— day of April, 1902." That language is precise and full enough to constitute a good averment that the insured met death by an "external, violent and purely accidental cause." The only basis for the attack on the petition is this sentence following the above allegation: "A more particular description of the circumstances of said accident can not here be given

because they are to the plaintiff unknown." The petition avers a mortal wound in the head, accidentally received, caused the death of the insured and ought not to be held insufficient because it goes further and states that the pleader was ignorant of the circumstances of the tragedy. The pleading was proof against an attack before verdict. But none was made until after verdict, when the petition is to be more generously regarded and no requirement imposed except that it must be inferable from its express averments that the deceased was killed by accidental violence. Munchow v. Munchow, 96 Mo. App. 553. Unquestionably, enough is stated to justify that inference, if indeed, the fact is not positively alleged; and we think it is alleged.

2. The principal defense rests on a term of the policy which stipulated that the amount to be paid if the insured lost his life, or received any of certain designated injuries "from unnecessary exposure to danger or to obvious risk of injury," should be one hundred dollars. The casualty company tendered that sum and contends that thereby it fully discharged its liability, as the evidence conclusively established that the deceased was killed from exposing himself to unnecessary danger and to a risk which was obvious. This contention raises these questions: What is the meaning of the term of the policy invoked as a defense? Is the inference inevitable from the evidence, that the deceased came to his death under circumstances that make the provision control the company's liability?

It was not the intention of the parties to the contract of insurance to exempt the company from payment of the maximum indemnity—one thousand dollars—if death resulted from a hazard incident to the duties of the insured as a bridgeman. This appears from the first clause of the policy, which says the insured "is entitled to indemnity on the basis of his liability to accident in the occupation of bridgeman, in the event of personal, bodily injuries." By virtue of that provis-

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ion all casualties to which the insured was exposed in the performance of the duties of a perilous avocation plainly came within the scope of the agreement to pay the full indemnity in case of accidental death.

The first point of doubt is as to what sort of negligence on the part of the insured, contributing to his death, would entitle the company to pay the minimum liability, and whether merely inadvertent conduct would be sufficient to do so, or only a conscious incurring of needless risk. Apart from the adjudications on the question, I should be inclined to the opinion that, as a main purpose in taking a policy of accidental insurance is to procure indemnity against the consequences of the insured party's carelessness and oversights, a stipulation against "exposure to unnecessary danger or to obvious risk of injury," excludes from the force of the policy, accidents occasioned by that positive sort of negligence which, in personal injury litigation, falls within the doctrine of assumed risk, and consists of knowledge of a danger and willingness to encounter it; but does not exclude such as happen from the mere failure of the insured to shun a danger unknown to him, but which might have been known by due care; or what is denominated, contributory negligence. This view would require, to bring into operation the minimum indemnity clause of the policy, volition on the part of the insured in needlessly exposing himself to danger, as in cases where the word "voluntary" is used. It seems to me the intention of the contract implies liability for an accident unless there was a voluntary assumption of unnecessary risk; an assumption of the risk not, of course, in the expectation of being hurt (which would amount to self-inflicted injury), but in the expectation of encountering the danger and avoiding injury from it. This view is countenanced to some extent by the adjudications; but the decisions turn so largely on the particular language of the policies construed that exactly apposite precedents are scarce. The cases dealing with

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the subject which I have examined, may be classified according to the language of the policies, as follows:

First. Cases like the present one in which the qualifying word "voluntary" is not found, but the exemption is for "exposure to unnecessary danger or obvious risk of injury." Cornish v. Ins. Co., L. R. 23 Q. B. Div. 453; Tuttle v. Ins. Co., 134 Mass. 175; Cawtelle Admx. v. Assurance Co., 15 Blatch. (U. S.) 216.

Second. Those wherein the clause of the policy construed was that the insured should exercise "due diligence for his safety," or words of similar import. Stone's Adm. v. Casualty Co., 34 N. J. Law 371; Duncan v. Mut. Acc. Assn., 13 N. Y. Supp. 620; Tooley v. Assurance Co., 3 Bissell (U. S.) 399; Badenfield v. Ins. Co., 154 Mass. 77.

Third. Those wherein the exemption was for wilful or wanton exposure to unnecessary danger. Schneider v. Ins. Co., 24 Wis. 28; Provident, etc. Co. v. Martin, 32 Md. 310.

Fourth. Those in which the clause invoked as exempting the company from liability provided an exemption if the insured voluntarily exposed himself to unnecessary danger. Bean v. Employers, etc. Co., 50 Mo. App. 459; Schneiderer v. Ins. Co., 58 Wis. 13; Mfg. Indemnity Co. v. Dorgan, 58 Fed. 945; Burkhard v. Ins. Co., 102 Pa. St. 262; Keene v. Ins. Co., 36 N. E. (Mass.) 890; Marx v. Ins. Co., 39 Fed. 321; Duncan v. Mut. Acc. Assn., 13 N. Y. Supp. 620; Travelers Ins. Co. v. Jones, 80 Ga. 541; Equitable Ins. Co. v. Osborn, 90 Ala. 201; Shaffer v. Ins. Co., 22 N. E. (Ill.) 589.

It is apparent that in the third and fourth classes of cases merely inadvertent negligence is excluded from the force of the exemption clause; that in the second class, where the proviso is for the exercise of diligence by the insured to secure his safety, the intention is to induce circumspection and caution and exempt the company from responsibility for accidents due to the insured's negligence. Opinions in cases of the first class are in

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point in the consideration of this one, for the reason that the language construed was similar to what we have here. An examination of those opinions shows that, while the courts have been careful in most instances to guard themselves against saying that any negligence of the insured which would defeat an action against the party that caused his injury on the score of contributory negligence, would likewise defeat an action on the policy, they hold that a provision against exposure to unnecessary danger, may be violated by his negligence of a certain degree. If, then, negligence constitutés a defense to this action, as those authorities declare, it follows that decisions on clauses providing that the insured must exercise due diligence for his personal safety are in point; for negligence is, of course, a defense under that kind of a stipulation.

Some of the precedents will be analyzed to deduce the rule they prescribe.

In Cornish v. Ins. Co., 23 Q. B. Div., supra, a farmer, while driving a wagon across a railway track, was killed by a train which he could have seen if he had been paying attention to what he was doing. The words relied on to exonerate the company were "the exposure of the insured to obvious risk of injury," and the court of Queen's Bench held that the clause excluded from the force of the policy two classes of accidents: First, those arising from exposure of the insured to a risk obvious to him at the time; second, those arising from a risk that would have been obvious to him if he had attended, with reasonable care, to his surroundings. The court declared it was not prepared to say that injuries caused by the negligence of the insured were, in all cases, exempt; but only that the policy did not protect him against the consequences of a risk which would have been obvious enough if he had been paying the slightest attention to his acts. The effect of that decision is, that although the danger was not in fact known to the in-

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sured, yet if he was grossly negligent in not knowing it, he was so far at fault as to come within the exemption.

In Tuttle v. Ins. Co., 134 Mass. supra, the company was exonerated if the insured party exposed himself "to obvious or unnecessary danger," and he was required to "use all due diligence for his safety." He was killed while running along a railway track at night in front of a moving train for the purpose of getting on another train travelling on a parallel track. Under these circumstances the insured was held to have been guilty of exposing himself to obvious danger. The court said: "The conduct of the deceased was such as in the words of Mr. Justice COLT, 'is condemned by the general knowledge and experience of all prudent men and is conclusive on the question of due care.' The danger was obvious, the exposure to it was unnecessary, the want of due diligence clear." Again: "If a person voluntarily places himself in a position where he is exposed to an obvious danger and the precise injury happens to him which there is reason to fear, it can not fairly be held that the language of this policy was not intended and understood to be applicable to such a case." Although in that instance the policy did not require a "voluntary" exposure to unnecessary danger, it is plain that the insured both unnecessarily and voluntarily exposed himself.

In Sawtelle's Admx. v. Ins. Co., 15 Blatchf. supra, the decedent was killed by falling from a platform of a car at night while the train was in full motion, his fall being caused either by his riding on the platform or passing from one car to another. The language of the exempting clause was that no claim should lie against the company for death or injury "in consequence of exposure to unnecessary danger, hazard, or unnecessary venture." The decedent was held to have been guilty of negligence within the meaning of the exemption and that there was no question for the jury. This case decides that "negligence" and "exposure to unnecessary

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"danger" are equivalent terms and apparently that any negligence on the part of the insured which would have been a defense to an action against the railroad company, was a defense to an action on the policy.

In Tooley v. Ins. Co., 3 Bissell 399, the policy provided that the insured should not neglect "to use due diligence for self-protection," and it was held that "it was his duty to use that degree of caution and diligence which a prudent man would use under the circumstances in which he was placed."

In Keene v. Accident Co., 36 N. E. 891, the Supreme Court of Massachusetts had to deal with a policy providing against voluntary exposure to unnecessary danger and also with one that the certificate holder must use "all due diligence for his personal safety and protection." The former proviso was held to include a voluntary but not an involuntary exposure to unnecessary danger; that is, a conscious and intentional exposure—something the insured was conscious of and willing to take the risk of. Due diligence to be exercised by the insured was said to mean, not that he must guarantee himself against accidents, or that he could not recover for an accident to which some want of care on his part might contribute: he was not required to use all possible diligence, but all due diligence. The opinion further said that due diligence is not inconsistent with inadvertence, nor running such risks as prudent or cautious persons would run. In that case the deceased had been killed by getting off a car at a station and passing across some tracks with an umbrella hoisted so as to obstruct his view, with the result that he was struck by some freight cars which had been shunted along one of the tracks. It was held to be a question for the jury whether he had violated the policy.

Some of the decisions based on policies stipulating against a voluntary exposure to unnecessary danger, are more radical as to the negligence necessary to

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prevent a recovery and require an intentional act which a person of ordinary prudence would pronounce dangerous; that is, an act done with knowledge of its dangerous character. Burkhard v. Ins. Co., supra.

In Scheiderer v. Ins. Co., 58 Wis. supra, the exemption was for voluntary exposure to unnecessary danger and the facts were that the plaintiff, who was traveling on a train, fell asleep and while he was in a doze, not knowing or realizing what he was doing, arose from his seat, walking to the platform of the car and fell off. This act was held not to come within the exemption.

In Mfg. Indemnity Co. v. Dorgan, 58 Fed. supra, the insured, while ill, had gone on a fishing trip and was afterwards found lying in a brook face downward and dead. The court had to pass on the meaning of voluntary exposure to danger; and it was held that such an exposure was something beyond the ordinary; wanton exposure, or gross carelessness; that a less degree of negligence would not exempt the company.

In Marx v. Insurance Co., 39 Fed. 321, the insured was killed by falling from the platform of a car while the train was running. He had gone on the platform because he was suffering from overheat and nausea. The platform was said to be a dangerous place, but that it was for the jury to determine whether the circumstances considered, he unnecessarily exposed himself to danger in riding there.

Viewing the facts of the present case, so far as they are known, in the light of the foregoing authorities, some of which make a negligent exposure to danger even when the insured was ignorant that it was impending, a defense, we will endeavor to ascertain whether the argument of the defendant that the deceased was conclusively proved to have been guilty of negligence, is sound. In the first place, it is to be observed that the burden of proof was on the defendant to show the insured, Oscar Jamison, met death in a way

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that would bring into operation the policy's minimum indemnity clause. The legal presumption is that he was not negligent, but was observing due care, and the company must establish that he was so far at fault as to exonerate it from payment of the full indemnity. This was decided in an apposite case. Meadows v. Ins. Co., 129 Mo. 76; see also, Freeman v. Ins. Co., 144 Mass. 572; Bedenfeld v. Assn., 154 Mass. 77. What facts were proven on which to rest the argument that the deceased was to blame for his death? That the body was found a short distance from the railroad track with wounds on it, that blood-stains could be traced from there to the track, and that the deceased's hat was on the track cut in two, may be said to show he was killed by a train. But his avocation exposed him constantly to the danger of being thus killed and that was one of the risks insured against. He may have been struck while performing his duty carefully and according to his best judgment, and is not conclusively shown to have been careless by the fact that he was so near the track as to be hit by a train, though this does prove he was in a dangerous position. Erickson v. Railroad, 171 Mo. loc. cit. 658. The recited facts did not so completely overcome the legal presumption that, when killed, he was in the exercise of due care, as to take the issue from the triers of the facts. This was decided in Meadows v. Ins. Co., supra. In that case the company was not liable if the insured was hurt from voluntary exposure to unnecessary danger, and he was further bound to use due diligence for his personal safety and protection. The question arose as to whom the burden of proof was on to show the exempting clauses took effect, and it was ruled, as stated, to be on the insurance company. The further question was whether the company made sufficient proof that the deceased was negligent by showing certain facts. The deceased was found on a railway track, with his body cut diagonally across, the legs lying between the rails and the trunk outside. He had

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got into Chillicothe during the night and inquired about getting to St. Joseph and was told that he could leave at 4:20 a. m. He was further told there was a freight train that would not carry passengers; but he said he was a stockman and it would carry him. He then left the Wabash station and started across some railway tracks on which trains were moving. Shortly afterwards a scream was heard as of some one in distress, and at the same time the noise of a train was heard. The insurance company contended the only reasonable inference from those facts was that Meadows lost his life in attempting to pass between the cars of a moving train, in violation of his agreement not to expose himself to unnecessary danger. In dealing with this contention, the Supreme Court held that while that theory might be true, the facts were insufficient to overcome, as a matter of law, the presumption that he was exercising due care, but were for the jury to weigh.

In Badenfeld v. Ins. Co., 154 Mass. supra, it was asserted to be an irresistible inference that the insured fell while leaving a train which was in motion. On this contention the Supreme Court of Massachusetts held, that granting the proposition to be true, it would not conclusively establish that the deceased was negligent; but whether or not he was negligent would depend on the circumstances under which he left the moving train; "and there would be be no presumption that the circumstances were such as to make it negligence." Numerous cases to the same effect might be cited; but those are sufficient for the present purpose; and they establish the proposition that the circuit court could not, from the circumstances above stated, properly have drawn the conclusion, as a legal inference, that Oscar Jamison was killed while exposing himself to unnecessary danger or to obvious risk of injury.

What is relied on further and principally in this connection is the testimony of one of the persons who discovered the deceased the morning after he was

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wounded, that the deceased said to him he had been struck by a train while asleep. We will notice presently the character of this evidence with a view to determining the weight that ought to be given to it. But granting the declaration was true and that the deceased fell asleep, the inquiry arises whether that was such negligence on his part as to constitute, under all circumstances, exposure to unnecessary danger. The duty of the deceased was to remain at the bridge, watch for trains and flag them. If he fell asleep while at his post, we think there is a possibility that he did so blamelessly. Instances are numerous in which railroad men who were exhausted from being worked overtime have been suddenly overpowered by sleep at their posts, quite against their wish or expectation. If Oscar Jamison lay down, or otherwise disposed himself to go to sleep where he knew he would be hurt by a train if one passed, he was guilty of taking an unnecessary risk and the fact would prevent recovery of the full indemnity. If he fell asleep, the case is like some of those cited above in which a passenger fell off a train. The fact may have been or not, according to the circumstances, exposing himself to unnecessary danger. That is to say, it was a question for the jury, or for the court acting as a jury. He may have sat down during his vigil at a point out of danger, have fallen asleep and moved, while asleep, into danger. We can indulge no presumption in regard to the matter.

The testimony supposed to prove the defendant was asleep when struck by the train, was given by a witness who saw him in the morning of April 15th, after he had been injured the night before. The witness said that Jamison was then in a semiconscious condition and testified further as follows:

"I first said to him when I approached him, put my hand on his breast and said 'what in the world is the matter?' He opened his eyes and looked at me, but

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didn't speak until I repeated the question and then he said he didn't know. I asked him then if he had been hit by the train; repeated the question before he answered it, and he said he had. I asked him then if he had fallen asleep; repeated this question before he answered it; he said 'Yes.' I asked him how he came to go to sleep; said he didn't know.

"Q. Where was Jamison at the time this conversation was held with reference to the place where you found him? A. He was lying right where I first found him.

"Q. Who was present when said conversation was held? A. Only he and myself."

From the testimony it seems that the deceased was in such a stupor while the witness talked to him as to render it very doubtful if he understood what was said to him or by him. When first asked what was the matter, and after the question had been reiterated, he said he did not know what was the matter; and his other replies may have been mechanical assents to the inquiries addressed to him. He had been in an unconscious condition for hours and died shortly afterwards, and in that state was as likely as not to give an affirmative response to a suggestive question. We think the circuit court might justly have attached little importance to the statements of the deceased as proving that he was killed while asleep on the track. Assuredly, those statements do not establish that fact so conclusively as to make it our duty to determine it contrary to the finding below.

The judgment is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

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HANHEIDE, Respondent, v. ST. LOUIS TRANSIT COMPANY, Appellant.

St. Louis Court of Appeals, February 2, 1904.

1. **STREET RAILWAYS: Duties of Motormen and Drivers of Vehicles: Jury Question.** The plaintiff, driving a heavy wagon, started across the track on which defendant's car was approaching, looked and saw the car at a distance of 225 feet while his horses were about five feet from the track, and whipped up his team in order to get across, when the wagon was struck on the rear end before it was wholly across, causing the injuries complained of. *Held*, it devolved upon the plaintiff and the motorman alike to exercise due care to avoid the collision and it was for the jury to determine which was in fault.

2. ———: ———: **Last Chance.** And, although, plaintiff was negligent in approaching and crossing the track, under the circumstances, that would not justify the infliction of the injury, if the motorman by the exercise of reasonable care and caution could have avoided it.

3. **INSTRUCTIONS: Contributory Negligence: Ignoring Defense.** In an action for injuries received in a collision with a street car, caused by the negligent management of the car by defendant's servants, where the defense was contributory negligence on the part of plaintiff, it was error to submit an instruction, covering the plaintiff's theory of the case, which ignored the defense of contributory negligence, unless such defense was properly presented in other and separate instructions.

4. ———: ———: ———. Another instruction, which purported to give a legal definition of contributory negligence, but demanded that such negligence shall be the sole and direct cause of the accident, in order to defeat recovery, was insufficient to meet the requirement.

Appeal from Franklin Circuit Court.—*Hon. Wm. A. Davidson*, Judge.

REVERSED AND REMANDED.

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Sears Lehmann with *Geo. W. Easley* and *Boyle, Priest & Lehmann* for appellant.

(1) The court erred in giving instruction No. 1 for the plaintiff. (a) This instruction ignores the issue of contributory negligence of the plaintiff in driving on and remaining on the track in front of a moving car, raised by the defendant in the pleadings and brought out by plaintiff's own evidence. Such instructions are erroneous. Sullivan v. Railroad, 88 Mo. 169; Carrico v. Railroad, 14 S. E. 12. Especially is this error, when such issue is not covered properly by other instructions. Schroeder v. Michel, 98 Mo. 43. (b) This instruction singles out certain facts and tells the jury that if they believe these facts then they should find for the plaintiff. Such instructions are erroneous. Chappell v. Allen, 38 Mo. 213; Schaffer v. Lealy, 21 Mo. App. 110; Meyer v. Railroad, 45 Mo. 137. (2) Under the instructions in this case the question of the plaintiff's negligence was not submitted to the jury. The evidence showed that plaintiff drove on the track from 100 to 225 feet in front of a moving car which he plainly saw, and attempted to cross the track at a slow walk. The question of his negligence under these circumstances was a question for the jury, and should have been submitted to them. Cass v. Railroad, 47 N. Y. Sup. 356; Linder v. Transit Co. (this term of this court); Patterson v. Townsend, 91 Iowa 725, 59 N. W. 205; Lowy v. Railroad, 62 N. Y. Sup. 743; McCormick v. Railroad, 44 N. Y. Sup. 684; Kennedy v. Railroad, 52 N. Y. Sup. 550; Witzel v. Railroad, 52 N. Y. 521; Kerr v. Railroad, 63 N. Y. 310. (3) The court committed error in constantly interrupting defendant's counsel as he was arguing the case to the jury, and making remarks prejudicial to the defendant in the presence of the jury. 21 Am. & Eng. Ency. of Pl. and Practice, 994; State v. Manhattan Rubber Co., 149 Mo. 181; McPeak v. Railroad, 128 Mo. 617; Wright v. Richmond, 21 Mo. App. 76.

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Scullin & Chopin and *John W. Booth* for respondent.

There is no error in the instructions given by the court in this case authorizing the jury to find the issues for respondent. Sepetowsky v. St. Louis Transit Co., 76 S. W. 696, and cases there cited; Hutchinson v. Railroad, 88 Mo. App. 376; Moritz v. St. Louis Transit Co., 77 S. W. 477.

STATEMENT.

This, an action for damages for personal injuries sustained by plaintiff in collision between his wagon and an electric car of defendant, on the sixth day of November, 1902, was begun in the circuit court of the city of St. Louis, and upon application of plaintiff for change of venue, transferred to the circuit court of Franklin county.

The petition contained averments that plaintiff was driving in a western direction on North Market street, and when he reached the point of its intersection with Fifteenth street and while crossing defendant's tracks, his wagon was struck by a car travelling northward on Fifteenth street and his consequent injuries were described: the assignments of negligence were negligent and careless management of defendant's car by its servants, in failing to exercise ordinary care to keep watch for vehicles crossing said tracks, in failing to give any signal of the approach of the car, and to use ordinary care to stop the car after the danger to plaintiff became apparent, or by exercise of ordinary care, would have become apparent, and by running at a high rate of speed.

The defense, coupled with a general denial, the plea of contributory negligence in driving upon the track in front of a moving car, at a time and place when and where, by looking and listening, he might have seen and

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heard the approaching car in time to have remained off and gotten off the track and avoided the accident, and that he failed to look or listen for the approach of such car, and to heed what he saw, if he did look or listen, and thereby caused his own injuries.

The evidence introduced consisted of the testimony offered on part of plaintiff, defendant tendering none. Plaintiff testified that at about half past five o'clock in the afternoon, he was driving a team hauling a heavy wagon west on North Market street and in crossing Fifteenth street was struck by a car north bound; that before starting across Fifteenth street he had looked for cars and saw this car about three-quarters of a block, or 225 to 230 feet distant, at which time, his horses were about five feet from the track; that he saw the motorman was approaching with unabated speed and he whipped up his team to get across; that the tips of his horses' heads were about twenty-four feet from the wagon end, and the wagon was struck in the rear before it was wholly across. He further deposed that he rode on street cars but not very often, had frequently seen them and could form an opinion of the speed of a car going between two points; and while it was difficult to determine, the rate of this car was between 10 and 12 miles per hour; that the motorman made no effort to check the speed until about ten or fifteen feet from the wagon and there was no obstruction and he saw the car plainly when he drove on the track. Other witnesses differed but slightly from plaintiff in their description of the occurrence, the estimates of the distance separating the car from the wagon, when the latter was started across the track, varying, and two witnesses, former motormen, testified, one that on a level track a car could be stopped in twenty-five feet moving at a rate of twelve miles per hour, and if the track was slippery, ten feet more would be required, and the other that at rate of twelve miles per hour on a slippery track, thirty-five feet was the least distance in which a car could be stopped.

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At the close of plaintiff's testimony the court charged the jury by a series of instructions and those as to the measure of damages, form of verdict and definition of ordinary care, appellant makes no complaint of. The court gave as its first instruction, and at instance of respondent, the following:

"1. The jury are instructed that if you believe from the evidence that plaintiff, driving a wagon and team of horses, drove on the track of the defendant in front of an electric car, provided with brakes and appliances for stopping such car, then being run and operated on said tracks by defendant at a speed of twelve miles per hour, and that plaintiff and said wagon and team being so on said track were crossing the same at a slow walk and were then and there in a place of great danger, and were then and there seen by defendant's motorman then and there operating said car, to be so on said track and so crossing the same while the said car was at such a distance from plaintiff and from said wagon and team that by the ordinary use of the brakes and other appliances for stopping said car, said car might have been stopped and the striking of said wagon by said car might have been avoided and that said motorman, so seeing plaintiff and being aware of his situation, continued to run said car toward plaintiff without attempting to stop said car until it was so close upon plaintiff and said wagon that it could not be stopped in time to avoid striking said wagon and injuring plaintiff, and that by reason thereof said car struck said wagon and injured plaintiff as alleged in plaintiff's petition, then such failure to attempt to stop such car under such circumstances and in the absence of explanation or excuse would be negligence chargeable to the defendant, and if the jury find the facts to be as aforesaid, they should find the issues for the plaintiff."

After the argument, the following was given of the court's own motion:

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"If the jury find from the evidence that the fact that plaintiff drove on the track of defendant in front of a moving car, if you find he did so drive on said track and that was the sole and direct cause of the injury, you will find the issues for the defendant, but if you find that after plaintiff drove on said track defendant's motorman operating the car saw plaintiff on the track while the car was at such a distance from plaintiff that he could, by the use of the brakes on said car provided for stopping the same, have stopped the same in time to have avoided injuring plaintiff, and neglected to so stop the car and run the car against plaintiff's wagon and injured plaintiff, then you can not find that plaintiff's driving on the track was the sole and direct cause of plaintiff's injuries."

REYBURN, J. (after stating the facts as above). —1. The first instruction above is assailed as wholly ignoring the issue of contributory negligence, and the Sullivan case (88 Mo. 169), is invoked in support of the contention. The true rule is, the instructions are to be taken as a whole, and if the defense of contributory negligence had been presented to the jury, though disregarded in the first, but properly presented in a subsequent and separate instruction this would have been sufficient, and such is the doctrine of Owens v. Railway, 95 Mo. 169, wherein, the contrary ruling of the above authority relied on by appellant, is expressly repudiated. But this method was not pursued, defendant had interposed the defense of contributory negligence, and plaintiff's denial in his reply presented such issue, and defendant had the right to have such question submitted to the jury, and in the form in which the jury were instructed the stricture of this instruction was well founded, and it is fatally defective. Much of the reasoning in the case of Linder against this defendant (No. 9051, December 15, 1903) lately before this court, and cited by appellant is applicable to this case. The rights of em-

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ployment of public streets as highways by the public whether on foot or in vehicles, and their use for the convenience of transportation of the public by cars propelled by electric power are equal and concurrent, and to be taken advantage of and exercised to avoid injury and with reasonable regard to the common safety. It devolved alike on the plaintiff and motorman of defendant to exercise due care to avoid the impending collison, and it was for the jury and not for the court under the facts and circumstances herein presented, to determine which party was at fault. The Supreme Court in a recent case, not adverted to in this argument, has again announced the legal principles governing where a collision has ensued between a private vehicle and an electric car, and while in many particulars the facts therein reviewed do not resemble those presented by this record, yet light is thrown on this case therefrom, and especially in two directions. It is therein held that at a crossing or intersection of public streets, no particular rate of speed can be deemed lawful regardless of the conditions and circumstances that confront the motorman at the time, and where a motorman discovers that a vehicle is negligently approaching a crossing, it becomes his duty to regulate the speed of his car, if in his power, so as to avoid the infliction of any injury, and the familiar doctrine is therein reiterated that the mere negligence of a plaintiff in approaching and crossing a track would not justify the infliction of an injury if it could be avoided by the adoption and exercise of reasonable care and caution. Holden v. Railroad, 76 S. W. 973. The same doctrine has been announced in this court in these words: "The settled rule in this State is that, though the plaintiff negligently placed himself in a perilous position by driving on or near the track, the motorman operating the car owed the plaintiff the duty of trying to avoid injuring him, and plaintiff's previous negligence did not bar a recovery, if the injury resulted from the

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negligence of the motorman in not stopping or checking the car,'' citing numerous decisions. Septowsky v. Transit Co., 76 S. W. 693.

2. The instruction, already quoted, given after the argument had proceeded, in no wise modified or injected into the first instruction for plaintiff a proper consideration of the contributory negligence, if any there was, on the part of plaintiff. While purporting to give a legal definition of contributory negligence, this instruction demands that such negligence shall be found the sole and direct cause of the accident, an interpretation at war with the term ''contributory'' itself. This court has lately held in such cases, that if the accident be caused by the joint and concurring negligence of both plaintiff and defendant's agents, and the negligence of neither without the concurring negligence of the other would have caused the injury, the plaintiff is not entitled to recover. Hornstein v. Railroad, 97 Mo. App. 271.

3. The appellant has made conspicuous the discussion participated in by the trial judge and opposing counsel prior to argument to the jury, as a result of which appellant's counsel declined to present any argument on its behalf; it will suffice to dispose of this branch of the case by the expression by this court of the confident belief that such occurrence will not recur at any future trial.

Judgment reversed and cause remanded. *Bland, P. J.*, and *Goode, J.*, concur.

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PURDY, Appellant, v. PFAFF, Respondent.

St. Louis Court of Appeals, February 2, 1904.

1. **PLEADINGS: Amendments: Changing Cause of Action.** An amended petition, which substitutes a different cause of action from that stated in the original complaint, is properly stricken out on motion of defendant.

2. ——: ——: ——. For the purpose of determining whether there is a departure from the original cause of action, a second amended petition must be compared with the original petition, not with the first amended petition, though no objection was raised to the first amended petition on the ground of departure.

Appeal from Lawrence Circuit Court.—*Hon. H. C. Pepper*, Judge.

AFFIRMED.

W. Cloud for appellant.

Respondent by his brief still would insist that the claim of the salary of the post office was against public policy. There is no longer any question before the court on this point, since the demurrer was sustained and appellant by the amended petition has waived any claim based on that contention. This brings us to the point at issue: To-wit, as to whether after the abandonment of the original petition by filing the first amended petition which became the original by taking its place, the petition first filed was any part of the record for any purpose? If this amended petition contained two causes of action, as adjudged by the court in sustaining demurrer to same, then one of them must have been a specific claim for the use of the furniture and fixtures, which, it had been alleged in the first petition had

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been used by respondent for ten months by permission of the appellant, for which he was to pay. If this claim was so stated in the first amended petition as to be a cause of action, and it was a fact that it had not been so stated in the cause of action counted on the first petition then there might have been a departure and it might have been stricken out on respondent's motion. If he allowed it to stand as a cause of action and by his demurrer had it adjudged as such, he could not when the same cause of action was restated in the second amended petition have it stricken out, because it was a departure from the first petition, the first petition was no longer in the case for any purpose, having been abandoned by all parties. Ross v. C. & A. M. L. Co., 162 Mo. 317.

Thos. Carlin for respondent.

The only point for review, is the action of the court striking out appellant's second amended petition. The original petition is prolix in evidence and inducement, but nowhere states that respondent used or promised to pay for the use of post office fixtures. Plaintiff's second amended petition is founded upon a claim for the use of post office fixtures. Attached thereto is an account, not referred to in the petition. There was nothing in the original petition from which it could have been inferred that appellant sought to recover other than for the salary of acting postmaster. Our code does not permit a party to inject into or to substitute an entirely different cause of action in an amended petition for that originally declared upon in his first petition, for that would be a departure. Ross et al. v. C. & L. Co., 162 Mo. 317; Leslie v. Meyer, 143 Mo. 547; Heman v. Glann, 129 Mo. 325.

REYBURN, J.--The sole question presented for the decision of this court necessitates the reproduction of the plaintiff's pleadings although they are somewhat

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lengthy. Plaintiff brought this action to November term of the circuit court of Lawrence county, by filing the following petition:

"Plaintiff states that on June 1, 1900, and for a long time prior thereto George A. Purdy was, and had been postmaster at Pierce City, Missouri, under an appointment of the President of the United States for a term ending January 21, 1902. That as such he had executed bond to the United States in the sum of $6,000 by which he had bound himself, his heirs and executors to perform and cause to be performed all the duties of said office during his said term and his successor should be duly appointed and take charge of said office. That the defendant and others were his securities in said bond and by its terms become liable to the penalties of the same if default was made and the principal in said bond should not pay the same. That the duties of said office were in part, that a suitable room and place should be maintained with boxes, safes, and other furniture and fixtures to receive all mailable matter coming, see that it was properly stamped, cancel the stamp, and forward the same to its proper destination. To receive and distribute all such matters as might through the regular channels of the mail come to said office. To sell stamps and postal cards, issue money orders and collect fees and commission therefor, to rent the boxes and collect the rentals due on same, to pay off all legitimate expenses including his own salary and commissions, and remit the balance to the United States treasury. That for his services he received about one hundred and fifty dollars, out of which he had to pay two clerks and all other expenses. That all the fixtures and furniture was furnished by the postmaster at his own cost and was his own individual property. That the said Purdy was on said date employing two clerks, for which he paid them $30 and $15, respectively and the said clerks were doing all the work required in said office. Plaintiff says that on the first day of June, aforesaid, the said George A.

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Purdy died, leaving the said office with all its fixtures, furniture and belongings in charge of the plaintiff as his widow and executrix, but more immediately in charge of the clerks aforesaid, who were there and continued thereafter to perform all the work in said office at the same salary, till the successor of said Purdy was appointed and took charge of said office on the first day of April, 1901. That in order that the securities on his said bond and the estate of Purdy be fully protected, and the contract therein contained be fully executed till such time as there should be appointed, it was arranged between the plaintiff and the bondsmen for the defendant to be in personal charge of said office and to act for them (*pro tem*) and do such acts and duties as could only have been done by the said George A. Purdy, personally, take charge of the receipts of said office, collect the compensation allowed to said Purdy, pay all the expenses, all of the same, and after receiving a reasonable compensation for his services, pay the remainder to plaintiff. That under said arrangement, agreement and understanding the defendant collected each month the sum of one hundred and fifty dollars, paid to the clerks forty-five dollars, which was all the expenses for which the office was liable, appropriated the balance of one hundred and five dollars each month to his own use and continued to do this for ten months and had failed to account for the said sum of $1,050 so received or to pay the same or any part thereof to the plaintiff, although required so to do. That the said George A. Purdy left a will by which he devised all his property and personal effects to this plaintiff who was also appointed and named there as his executrix, which will was on the fourth day of June, 1900, duly probated in Lawrence county and letters testamentary were granted to plaintiff; that on the first day of October, 1901, plaintiff demanded of defendant the amount sued for. Wherefore plaintiff prays judgment for one thousand and fifty dollars with the interest thereon from the first

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day of October, 1901, at the rate of six per cent and for costs.''

Defendant's general demurrer was awaiting the action of the court when, by leave of court, plaintiff substituted an amended petition, thus:

''Plaintiff for amended petition states that on the first day of June, 1900, her husband George A. Purdy was postmaster at Pierce City, Missouri, under an appointment of the President for a term ending January 21, 1902, and had at a large outlay furnished the office with the latest and most improved fixtures and furniture for conveniently operating the office and had procured the assistance of clerks, whom he had trained until they were fully competent to carry on said office for all of which he received about $1,800 per year, out of which he paid his clerks $45 per month. He had executed a bond to the government in the sum of $6,000 conditioned that said office should be carried on during his term according to law, and the defendant, Albert Pfaff and R. T. Brite, Frank Wicks, Barney Mullrenin, Chas. Hellweg, Fred Albert were his bondsmen. That on the said first day of June, 1900, the said George A. Purdy died testate, giving to plaintiff all his personal effects and appointing her executrix of his will with full power of disposing of his property and thereafter on the fourth day of June the said will was probated when she took charge of the estate, including the post office, fixtures and furniture aforesaid. Upon the death of George A. Purdy, the bondsmen aforesaid took charge of the office including the property and deputed the defendant to carry on the business of said office until such time as other arrangements should be made. Soon after the plaintiff took charge of her late husband's affairs, there was a movement made by her friends to give her the benefit of the office during the unexpired term of her late husband of which the defendant was advised, and came to the home of plaintiff to confer with her in regard to the matter, and informed her that he had in-

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tended to apply for the office, but he had heard of the movement of her friends to give her the benefit of the office and if she desired it he would be glad to assist her and would not put in an application until the expiration of said term, but that he would like to stay in the office and qualify himself to become postmaster and place her friends under obligations to assist him to get the appointment. That the assistant postmaster and clerks were competent and able to carry on the office without his assistance, but that for the reason mentioned he would like to be retained and his compensation would be small as the office was fully equipped and the bond would continue, and he would have no additional responsibility. That he wanted her to have so much of the pay, inasmuch as it all rightfully belonged to her. That he would be glad to assist her in any way he could and that he would go ahead and continue to act for the bondsmen, and after paying the expenses of clerk hire, rental of fixtures and reasonable compensation for such services as he should render, he would pay her the balance allowed said office, provided she would allow him the use of the fixtures and property in said office belonging to her as heretofore agreed by them, to which she agreed. And she immediately advised her friends of this arrangement which was satisfactory to them, and thereupon took steps as that, there was no appointment made for ten months. During all of which time the defendant was fully advised of what her friends were doing and he was in frequent consultation with her attorney as well as herself, and professed to be assisting in carrying out the arrangement. And in furtherance thereof continued in the office acquainting himself with the duties thereof, for such time as he could leave his mercantile business at Monett until April 1, 1902. The same clerks who had been doing the business when he went into the office continued to run the office as they were fully competent and able to do for the same salary paid theretofore. All the fixtures and furniture remain-

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ing as before agreed upon. The use of which was of great value to him, to-wit, $25 a month which he had theretofore agreed to pay plaintiff. Plaintiff states that the government paid to defendant on account of said post office, $1,500 out of which he paid to the help $450 leaving in his hands a balance of $1,050 which he agreed to pay plaintiff as aforesaid, after deducting a reasonable amount for his services and other expenses which would not exceed $300 which he has failed to pay plaintiff, although often demanded, wherefore she prays that by reason of the agreement, and by reason of the use of the property and fixtures aforesaid, she have judgment for the sum of $750 with interest thereon from the time of demand, to-wit, the first day of May, 1901, at the rate of six per cent and costs."

A demurrer, based on the reasons that the amended petition did not state facts sufficient to constitute a cause of action against defendant, and that several causes of action were sought to be pleaded in the same count, was sustained and a second amended petition filed by leave in form following:

"Plaintiff for amended petition states that on the first day of June, 1900, her husband, George A. Purdy, was postmaster at Pierce City, Missouri, under the appointment of the President, for a term ending January 21, 1902. And had at a large outlay furnished the office with fixtures and furniture for conveniently operating the same, which remained his property. He had executed a bond to the government, conditioned as required by law, with the defendant and others as his bondsmen. That on the first day of June, 1900, the said George A. Purdy died testate leaving to the plaintiff all his effects, including the property aforesaid, appointing her, the plaintiff, executrix of his said will with full power of using and disposing of all of the personal property and effects belonging to said estate. That on the fourth day of June, 1900, said will was duly probated and then she

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took charge of the said estate, including the property hereinbefore and hereinafter mentioned.

"That upon the death of said George A. Purdy the bondsmen took charge of the office and deputed the defendant to carry on said office until such time as other arrangements should be made, which he then and there did. And the defendant desiring to hold and use the said fixtures and furniture in said office belonging to her as aforesaid, consisting of lock and call boxes and general delivery boxes, and connections, safe, distributing boxes, table and boxes, racks, stoves, chairs, and all other furniture and fixtures used in the Pierce City post office at that time, for which he then and there agreed and undertook to pay plaintiff $25 per month for the use thereof. That under said agreement he kept and used said property for ten months by which he became indebted to plaintiff in the sum of $250 which amount the defendant has failed to pay, although often requested to do so. Wherefore plaintiff prays judgment for $250, the interest and cost.

Plaintiff for another cause of action alleges that on the fourth day of June, 1900, she was the owner and entitled to the possession of the following personal property, to-wit, all the furniture and fixtures of the Pierce City post office, consisting of lock and call boxes, general delivery, money and stamp departments, desks, iron safe, chairs, distributing table, racks, stove and all other furniture and fixtures used in said office. And the defendant desiring to use the same was permitted to do so by the plaintiff, upon his request, for which he undertook to pay a reasonable sum for the use of same, which the plaintiff alleges was $25 per month; that he continued to use the same for ten months; that he has failed to pay said sum or any other sum for the use thereof though often requested so to do. Wherefore she prays judgment for two hundred and fifty dollars, interest and cost."

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A motion to strike out this second amended complaint predicated on objection that it was a change, departure from and abandonment of the cause of action attempted to be set up in plaintiff's original petition, was sustained, plaintiff declined to plead further, and from judgment for defendant this appeal has been duly taken.

The appellant seeks to uphold the second amended petition, upon the theory that there was no departure therein from the amended petition, the cause of action pleaded in the final complaint having been contained in a different form in the first amended pleading, which defendant, in lieu of assailing by motion to strike out as a departure from the original petition, elected to test the legal effect of by demurrer. Under the code the office of a demurrer is the same as it was at common law, it still is directed to the legal effect of the pleading for defects apparent on face of the pleading, but is confined in range to the statutory limits. Bliss, Code Pleading, sec. 404; Beattie Mfg. Co. v. Gerardi, 166 Mo. 142. But the amended petition may have been vulnerable to objections by demurrer testing its legal sufficiency in setting forth a valid cause of action, and also to motion to strike out as constituting a departure from the cause of action pleaded in the petition; the resort to such motion being the proper method of raising the question of such variance. Manufacturing Co. v. Gerardi, supra.

In Scoville v. Glassner, 79 Mo. 449, later approved in Liese v. Myer, 143 Mo. 547, the tests by which to determine whether a second petition is an amendment or the substitution of a new cause of action is discussed at length, and declared to be first, whether the same evidence will support both petitions, and next, whether the same measure of damages will apply to both. If these questions are answerable in the affirmative, the modification is an amendment, if in the negative, a new cause of action is supplanted and it is a substitution. The original petition, while abandoned by the plaintiff, for

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purpose of presenting her right of action, remained the standard by which to determine whether subsequent petitions embraced the original cause of action, upon which suit was brought, or were departures therefrom and recovery on new causes of action sought. Ross v. Land Co., 162 Mo. 317. While the right of amendment under the code is liberal and comprehensive, a limitation, imposed thereon in this State, is that an amendment of a petition shall not introduce new causes of action, and after instituting an action upon one state of facts, plaintiff is not permitted by amendment of the complaint to substitute a different cause of action from that stated in the original complaint, thus substantially changing his original claim. Ross v. Land Co., supra; Liese v. Meyer, supra; Heman v. Glann, 129 Mo. 325; R. S. 1899, sec. 657.

The judgment of the trial court was correct and is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

McCREADY, by next friend, Respondent, v. STEPP, Appellant.

St. Louis Court of Appeals, February 2, 1904.

1. **MASTER AND SERVANT: Duty to Furnish Safe Appliances: Animals.** It is the duty of the master to furnish, for use of servants in his employment, appliances and instruments, safe and suitable for the purposes for which they are furnished; and this rule embraces animals to be used by the servant as well as inanimate appliances.

2. ———: ———: ———: **Notice to Master.** To entitle a servant to recover for injuries received from a dangerous horse with which he was put to work, it was not necessary that the master should have had actual knowledge of the vicious character of the horse, but notice of circumstances which would put a reasonably prudent man on his guard, was sufficient.

Appeal from Greene Circuit Court.—*Hon. J. T. Neville*, Judge.

AFFIRMED.

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Hamlin & Mason and *Geo. Pepperdine* for appellant.

(1) Where there is no evidence of a fact, or no evidence from which a jury can legitimately infer its existence, and the existence of such fact is vital to the case, the court should take the case from the jury, and not allow the jury to infer its existence without evidence. O'Mally v. Railroad, 113 Mo. 319. The mere proof that an injury has happened does not authorize submitting the question of negligence to a jury. Murphy v. Railroad, 115 Mo. 111; Yarnell v. Railroad, 113 Mo. 570. The dangerous character of the horse, and defendant's knowledge thereof are material facts in the case. The burden of proving both of which is on plaintiff. Smart v. Kansas City, 91 Mo. App. 586; Hester v. Dold Packing Co., 84 Mo. App. 451; Murray v. Railroad, 101 Mo. 236; Benoit v. Troy & L. R. Co., 154 N. Y. 223.

A. H. Wear and *J. T. White* for respondent.

(1) It is the duty of the master to provide suitable and safe appliances for his servants, and if he fails to do so, or puts the servants in charge of appliances which are unsafe, when he has reasonable grounds to believe they are unsafe, he is liable for any damages which may result. A horse is an instrument within the meaning of the above rule. Leigh v. Railway, 54 N. W. (Neb.) 134; Hammond v. Johnson, 56 N. W. (Neb.) 967; McGarry v. Railroad, 18 N. Y. Sup. 195; Knickerbocker Ice Co. v. Finn, 80 Fed. 483. (2) The notice required which would make the defendant liable for the damage caused by his vicious animal is only knowledge of such facts as would put a reasonably prudent man upon his inquiry. If he knew, or by the exercise of reasonable care could have known that the animal was dangerous, it is sufficient. Ray on Neg. of Imposed Duties, 605; O'Neal v. Blase,

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94 Mo. App. 648. (3) It is the duty of the master to use reasonable care and foresight in procuring appliances to be used by those in his employ, and the servant has a right to rely upon the master performing his duty. Dedrick v. Railway, 21 Mo. App. 433; Porter v. Railroad, 60 Mo. 160.

STATEMENT.

From judgment rendered upon a majority verdict of a jury in favor of plaintiff, defendant has appealed. The petition for plaintiff's cause of action, embraced averments that defendant, a retail grocer in Springfield, had in use a one-horse wagon for delivery of goods sold to his customers, and about August 13, 1902, while in defendant's employ and about the duties of such employment, defendant wrongfully ordered plaintiff, a minor, to deliver groceries and run such wagon, having at the time hitched thereto a horse, wild, vicious, dangerous and unsafe to use for such purposes, and which wagon was therefore unsafe. That plaintiff was ordered and required by defendant to go in and run such wagon with such horse and deliver goods. That while in performance of his duty in running and riding in such wagon for purpose of delivering goods therefrom, under the order of defendant, the horse became unmanageable and ran away, breaking plaintiff's leg in two places, and plaintiff had received such hurts by reason of the negligence of defendant in requiring him, a boy of fourteen years, to run such wagon and deliver goods with such dangerous horse thereto attached. That the character of the horse was bad, and he was a wild and dangerous animal, liable to run away and kick, and its character was known to defendant at time he required plaintiff to go in the wagon; that plaintiff was ignorant of the character of the horse, and inexperienced, as a boy of such age usually is, in management of horses, and the injuries sustained were then detailed and judgment for damages prayed.

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Defendant answered in a general denial.

The facts disclosed at the trial, in effect, were that plaintiff had been in the employ of defendant for several months, with duties of assisting in a grocery store and delivering goods to customers, for which defendant made use of two wagons with two drivers, plaintiff accompanying the driver of a wagon to assist in delivering groceries; that on August 13, 1902, plaintiff was ordered to go with Beltz, who was driving one of the wagons, and while making deliveries, the horse suddenly became unmanageable, kicked and ran off. It appeared that one of defendant's horses commonly driven in one of the wagons had become ill, and the horse causing the mischief had been offered for sale to defendant, the day preceding the accident and had been left with him on trial. On the day after its delivery to defendant, the horse was hitched up in one of the wagons and had been driven by Beltz for two delivery trips, and the third had started when the occurrence took place.

REYBURN, J. (after stating the facts as above.)—A general charge of error is made against the action of the trial court in giving and refusing instructions; but no specific error is assigned, and the single comprehensive instruction given, presented and embraced the various features of the case, fairly submitted the issues to the jury if the evidence warranted such submission, which will be later considered, and is unobjectionable. The controlling element of the case involves the proposition, whether, under the evidence, the case should have been permitted to go to the jury, or whether the instruction directing a verdict for defendant should have been given, either at close of plaintiff's case, or at termination of all the evidence, at both of which stages it was requested and declined. It was the duty of Stepp, as master, to furnish for the use of his servants, while in course of his employment, appliances and instruments proper, safe and suitable for the purposes for which they

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were furnished and for the performance of the services required; and this rule extends to and embraces instruments and appliances, animate as well as inanimate. McGarry v. R. R., 18 N. Y. Supp. 195; Knickerbocker, etc., Co. v. Finn, 80 Fed. Rep. 483; Leigh v. R. R., 54 N. W. Rep. 134; Hammond v. Johnson, 56 N. W. Rep. 967; Labatt, Master & Servant, sec. 206. To entitle the plaintiff however, to recovery in this case, it was incumbent on him to introduce testimony tending to prove not alone the dangerous character of the animal causing the injury, but to show as well that defendant knew, or by the exercise of proper care and diligence might have known of the vicious and dangerous character of the horse. Knowledge, actual or constructive, on the part of the master is a constituent element of such negligence essential to create any liability. Labatt, Master & Servant, chap. 14, sec. 206. The testimony upon these branches of the case was as follows: Jennings who took the horse to defendant for sale, deposed as follows:

"Q. When you went to Stepp's what conversation did you and Mr. Stepp have in relation to this horse? A. Well, he was wanting to know if the mare would work, and I told him; 'O, yes, she would work all right anywhere he put her.' He asked me if she was gentle. I says, 'Yes, but you have to be careful with her. She hasn't been here for a year; hadn't been worked for a good while. Been running on pasture.' He wanted to buy her, and I asked him one hundred dollars for the mare, and at last I told him he could have her for ninety-five dollars, and he says 'I would rather take that mare and keep her for awhile,' and asked me if I could come back Monday, and I told him I couldn't say that. He would have to go out and see Mr. Hodgson. He was out in the wagon and he went out and asked Mr. Hodgson if he could keep the mare and work her until Friday when I came back, and he would probably buy her if she suited him. And I says, 'You can keep her if you will be responsible.' He says, 'I will be responsible if it is

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my fault;' and he says, 'Of course if she should lie down and die she might do the same with you;' and then Hodgson or me, and probably both says, 'You want to be careful and not let any boy drive her, because she is pert and has not been driven, and she won't stand a whip.' He says, 'I will have a man, and not let any boy drive her.'

"Q. Was anything said there by Mr. Stepp in regard to his having heard that this mare was a runaway mare? A. Well, I don't know as he did to me. If he did I have forgotten.

"Q. Did you have a conversation with him at any other time in which he said he knew at the time you brought the mare there and left her he had heard she was a runaway mare? A. He told me afterwards that he had heard she had a runaway. He told me afterwards that she had run away.

"By the court:

"Q. Now let us understand, that he told you afterwards that at the time he was talking to you the first time he had heard she had run away, or told you he had heard it since that? A. I don't know as he said that. He told me afterwards that he had heard she would run away, but I don't know whether it was before he got the mare or not."

A lady customer of defendant thus testified:

"Q. Now, I will ask you to state if you were in Stepp's store—you know Mr. Stepp? A. Oh, yes.

"Q. How long have you known him? A. I don't know. I believe ever since he has been in the grocery business on Grant street. I don't know how many years. Perhaps ten or twelve years.

"Q. I will ask you to state if you were in his store on the morning of the 13th of August last? A. I think so, I didn't take any notice of the date. The morning of the occurrence of the accident I was in there.

"Q. Now shortly after you left there, to fix the

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date certainly in your mind, you heard of the boy being hurt? A. Yes, sir, a very short time.

"Q. Now I will ask you to state if you had any conversation with Mr. Stepp while you were in his store that morning in regard to a horse? A. Yes, sir.

"Q. Just tell the jury now what that conversation was? A. Well, I went in the store for something, I don't remember what, in the front door, and there was no one in there but Mr. Stepp and he was very busy doing up the grocery deliveries, and Harry was carrying groceries from the counter to the side door, and I had to wait until he got through for him to wait on me, and Mr. Stepp just remarked to me, 'I have got a new horse this morning, and he is a dandy,' was his remark; and when he got through with those things, and came around to get those things, and he says, 'Wait until the boys drive around and see it.' I am very fond of horses, and I waited a moment until Mr. Beltz and Harry came around. Mr. Stepp asked me if I didn't think he was pretty. I says, 'Yes, he is pretty in one way, but I think he is a bad looking horse;' and they stood there a little while in front of the door and Mr. Stepp said something about the groceries, and whether Harry was on the back of the wagon, or in the wagon I don't remember; but Mr. Stepp says to him, 'Get up there, sonny and you deliver the goods, and you be careful, and Mr. Beltz you hold the lines tight.' He cautioned them; and I said to the boy, 'You mind about going behind that horse.' I didn't like the way he looked. I couldn't tell you—he didn't kick, but he was a vicious looking animal, and shook his head and looked vicious, and as they drove away Mr. Stepp again said, 'Mr. Beltz, don't let go of the lines until you get back here.' "

The driver of the horse, Beltz, a witness for defendant, thus referred to the disaster and the cause.

"Q. Where did you make the first stop from the

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time you first started? A. On Scott street at Mr. Bloom's.

"Q. Now, go ahead and relate the rest of the trip? A. Then we made another stop at Mr. Davis', and we made another stop at Mr. Hedge's, and that was when the accident happened.

"Q. Tell about the accident? A. And just as I started up there she commenced kicking and running right from the start, and she run some distance, not far, but she kept kicking all the time. She finally kicked the boy and hurt him.

"Q. What did you do? A. And as I was driving, and she broke the front rod that runs across in front to put your feet on for a brace. When she kicked and broke that I saw I couldn't hold her any longer, and I threw myself back in the wagon so I could come up against the seat where I would have a better brace to hold her. I seen I couldn't hold her there when she broke the rod, and I threw myself back in the seat so I could keep a better hold on her.

"Q. Did you hold on to the lines? A. Yes, sir.

"Q. How were you holding the lines? A. I was holding the lines with both hands.

"Q. What position were your hands? A. Something like this (indicating).

"Q. Have you handled horses quite a good deal? A. Yes, sir.

"Q. All your life? A. Off and on."

Defendant testifying on his own behalf, said:

"Q. I will ask you the question if before the time that these men came to your place on the evening of August 12th, if you had heard anything about this horse or knew anything about it? A. I had, but I didn't know at the time it was the same horse. But Mr. Renfro had owned the same animal down here probably a year before that, and I heard he had one to sell and I came over to see what he had."

It was obviously not necessary, that defendant

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should have actual personal knowledge or proof of the vicious propensities of the horse; for the law would not afford him immunity until the horse had actually evinced to him its dangerous disposition by running away while in use by defendant, but notice of those circumstances, which should have placed a reasonably prudent man upon guard and which upon reasonable inquiry would have afforded information of the true character of the animal, were sufficient and imposed the same degree of responsibility on defendant as if possessed of actual knowledge. Upon the whole case there was sufficient testimony to submit to the jury, and the trial court was warranted in such course. The judgment, accordingly, will be affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

STATE ex rel. MILLS, Respondent, v. MAST et al., Appellants.

St. Louis Court of Appeals, February 2, 1904.

MINOR: Choosing Guardian: Public Guardian and Curator. A minor, whose estate is in charge of the public administrator, and ex-officio public guardian and curator, on attaining the age of fourteen years may choose another guardian and curator under section 3489, Revised Statutes of 1899.

Appeal from Butler Circuit Court.—*Hon. J. L. Fort*, Judge.

AFFIRMED.

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Phillips & Phillips for appellants.

(1) When public administrator has been appointed to take charge of an estate, he shall continue the administration until finally settled, unless he resigns, dies, is removed for cause, or is discharged in the ordinary course of the law, as the public administrator. R. S. 1899, sec. 294; State ex rel. v. Kennedy, 73 Mo. App. 184. (2) A public administrator can only be removed from office in the manner and for the same causes that a justice of the county court may be removed. R. S. 1899, sec. 291. (3) The probate court, for good cause shown, may order an estate out of the hands of a public administrator but not otherwise. R. S. 1899, sec. 289, last clause, and sec. 295, last clause, and see also sec. 298. (4) But the public administrator having once taken charge of an estate, except for good cause shown, the probate court can not order the estate out of his hands. Tittman v. Edwards, 27 Mo. App. 493; R. S. 1899, sec. 292; Leeper v. Taylor, 111 Mo. 322; Adams v. Larrimore, 51 Mo. 130; 1 Wag. St., p. 122, sec. 8, 4th Subd.

J. T. Davison for respondent.

(1) The bond of Mast, as public administrator, is valid and binding. An official bond is valid and binding on those who sign it, although it is not in the form prescribed by statute. State ex rel. Lafayette County v. O'Gorman, 75 Mo. 370; Newton v. Cox, 76 Mo. 352; State ex rel. Jean v. Ham, 94 Mo. 162. (2) The estate in this case was not in charge of the appellant as public administrator, but as public guardian; nor did he take charge of the estate on his own motion, but upon the order of the probate court, which order the court had authority to make. R. S. 1899, sec. 3536. (3) The appellant was not removed from office, neither as public

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administrator nor public guardian; but the probate court simply made an order which required him to turn over an estate, which he had been ordered, appointed, by that court to take charge of as public guardian, to a guardian who had been chosen by the minor upon attaining the age of fourteen years. Sec. 3489, R. S. 1899. (4) The order of the probate court directing Mast, the appellant, to take charge of the estate of the minor herein was an appointment; therefore Mast was "guardian and curator appointed by the court." And even though section 294, R. S. 1899, may apply to public guardians as well as to public administrators, the selection of Mills as guardian by the minor upon attaining the age of fourteen years, was good and sufficient "cause" for ordering the estate from Mast to Mills. Green v. Tittman, 124 Mo. 375. (5) The right of a minor on attaining the age of fourteen years to select a guardian of his or her estate, was a common law right and has been recognized all through the legislation of this State. The law empowering public administrators to continue in charge of estates after the termination of office was of later enactment, and at that time they were not ex-officio public guardians. Acts general assembly 1857, sec. 1, p. 3; acts general assembly 1885, p. 28.

STATEMENT.

This is an action upon the official bond of defendant Aaron Mast and his sureties, as public administrator of Butler county, Missouri. The pleadings are not reproduced, but from the statements of the respective parties, it is gathered that the petition contained averments that the relator was duly appointed, qualified and acting as guardian of estate of Parazada Thorne, a minor, that Thomas M. Lane, former guardian and curator of the person and estate of such minor, died January 30, 1895, leaving her without legal or natural guardian of her person or estate, and defendant Mast was duly ap-

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pointed, qualified and commissioned, and entered upon the discharge of the duties of public administrator of Butler county, for the unexpired term of above deceased and gave bond as such, which is embodied. That on the fourth day of March, succeeding, pursuant to an order of the probate court of Butler county, Mast took charge of the estate of the minor named, collected sundry sums of money belonging to her estate, and on the twenty-first day of February, 1899, owed and still owes her estate a balance of $723.35. That on the twenty-second day of May thereafter, said minor having attained the age of fourteen years, appeared before the probate court of Butler county and chose relator, then public administrator of Butler county, as guardian of her estate, and he was thereupon appointed such guardian by that court. That Mast, although ordered by such court to account to relator for the property in his hands of the estate of Parazada Thorne, has failed so to do and judgment was asked accordingly.

For answer defendants file a joint general denial, united with the plea that Mast was the guardian of Parazada Thorne at time of institution of the suit and that relator had no authority to institute the action. A non-jury trial was had December, 1901, the defendants interjecting objections that the petition did not state facts sufficient to constitute a cause of action against them; that respondent had no legal capacity to sue.

The proof, embracing oral testimony, and the records of the probate court of Butler county, and tending to establish the facts alleged in the petition, was not controverted, defendants offering no testimony, but was objected to for the reason that an estate of a minor, having passed into the hands of a public administrator, the ward or minor, was precluded from selecting another guardian until he died, resigned, or was removed. The defendants asked instructions appropriate to the theory of their defense, which the court refused, and from judgment against them, they have appealed.

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REYBURN, J. (after stating the facts as above).—Until the amendment of sections of chapter 15, R. S. 1879 by the thirty-third general assembly (Laws of Missouri, 1885, p. 27), the duties and powers of a public administrator extended no farther than taking charge of and administering upon the estate of persons deceased, under the conditions therein classified; by the above act the authority of such officials was first broadened so as to make them public guardians and curators as well as administrators, and imposing on them the further duties of taking charge of the persons of minors under the age of fourteen years, whose parents were dead and were without legal guardians, and the estates of all minors under that age whose parents, if surviving, refused or neglected to qualify as curators, or having so qualified, had been removed, or were from any cause incompetent, or of those who had no one authorized by law to take charge of their estates. In the statutes of 1889, also appeared a new section, by which the public administrator was created ex-officio public guardian as well, and to have charge of estates of minors ordered into his charge by the probate court. R. S. 1889, sec. 5336. Such was the law in force at time defendant Mast took charge of the estate of the minor named. R. S. 1889, sec. 299. With amendments of act of April 11, 1895 (Laws of 1895, p. 35) further enlarging the scope of the duties and authority of such officers so as to include custody and care of persons and estates of parties insane, such are the statutory provisions now prevailing. R. S. 1899, sec. 292, 3536. The amending act of 1885 further added to section 307 the words "and guardians and curators," so that section provided that the public administrator should have the same powers conferred upon, and be subject to the same duties, penalties, provisions and proceedings as enjoined upon or authorized against executors and administrators, so far as the same might be applicable. Sec. 300, R. S. 1889.

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In the interpretation of this statute, especially as affecting administration of estate of deceased, but subsequent to amendment, this court has held that its purpose was to provide a bonded officer to take charge of estates liable to be wasted, and that it was auxiliary to the general law and was intended to supply the deficiency in the particular named, but not designed to repeal or supplant any of the provisions of the existing general law. Tittman v. Edwards, 27 Mo. App. 492. At the time of the amendment above referred to and ever since, the statutes have contained a section entitling any minor having a guardian appointed by the court, upon attaining the age of fourteen years to make his or her own choice of another guardian or curator, whose appointment as such is to be confirmed by the probate court, if a suitable and competent person for the trust. (Sec. 5290, R. S. 1889), section 3489, R. S. 1899. This section also received the attention of the legislature of 1885, by authorizing the probate judge to act in such, with other enumerated cases, in vacation, as well as in term time, but was not otherwise disturbed. Laws of 1885, p. 175. Appellant relied upon the provisions of section 294, R. S. 1899 (sec. 301, R. S. 1889), which recites that when a public administrator has been *appointed* to take charge of an estate, he shall continue, unless he resigns, dies, is removed for cause, or is discharged. Attention is directed to the language adopted in this section as resembling section 3489, R. S. 1899 (formerly sec. 5290, R. S. 1889), empowering a minor having a guardian or curator *appointed* by the court to exercise the right of election, and which wording appellant insists, confines its operation to instances, where estates of minors are in charge of such officials not by virtue of their office, but by express and independent appointment of the probate court. In further construction of section 299, R. S. 1889 (sec. 292, R. S. 1899, except supplemental provision as to persons *non compos* as above), the Supreme

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Court has announced that in the instances embraced in the several classifications therein mentioned, the public administrator takes charge of estates and acts independently of any order of the probate court, but occupies the position of private administrator. Leeper v. Taylor, 111 Mo. loc. cit. 322. The above contention of appellant, however, lacks application herein, for the order of the probate court directing Mast to take charge of the estate of this minor is made part of the testimony introduced. It is worthy also of remark that the above legislative enactment enlarging the powers and duties of a public administrator to those of a public guardian as well, in terms limits such additional authority to minors under the age of fourteen years.

In conclusion no statutory provision has been invoked, nor has any authority interpreting the statute been submitted, nor has any reason been advanced why a minor, whose estate up to the period of attaining the age of fourteen years has been in custody of the public administrator as public guardian, should be denied the right at that age accorded by the statute of selecting a guardian or curator to his or her liking, subject to the approval of the probate court; especially does such deduction appear reasonable in view of the fact that after such age, such minor would have enjoyed such privilege in absence of any guardian. R. S. 1899, secs. 3485, 3486.

The judgment is accordingly affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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FRAZIER, Respondent, v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, February 2, 1904.

1. **SALES: Title in Vendor Until Payment.** In the absence of other agreement, express or implied, concerning the time of payment for chattels sold, the sale is made impliedly for cash, and title does not pass to the vendee until payment or tender of payment is made.

2. ——— : ——— : **Inference of Payment Not Cash.** But where the testimony of the consignor shows that he relied upon the promise of the agent of the carrier to see that he got his money, if consignee did not pay in a reasonable time, this is evidence from which it may be fairly inferred that the sale was not for cash on delivery.

3. **PLEADING: General Denial: Recoupment: Subrogation.** In an action by the consignee against a carrier, for conversion of a car load of coal, the defendant could not, under a general denial, recoup the price which it paid the consignor for the coal, nor the amount of the freight, nor raise a question of subrogation to the rights of the consignor by reason of having paid for the coal.

4. **CONVERSION: Common Carrier: Honest Mistake.** Although a carrier, in converting to its own use chattels carried, acted under an honest mistake as to their ownership, it is nevertheless liable to the consignee in an action for conversion.

Appeal from Knox Circuit Court.—*Hon. E. R. McKee*, Judge.

AFFIRMED.

Gardiner Lathrop, S. W. Moore and *L. F. Cottey* for appellant.

(1) The sale of the car load of coal to Frazier was a cash sale. Neither title nor possession, therefore, passed to him until he had made payment or tender of

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payment therefor, and he had no right of action for conversion against the defendant. Hall v. Railroad, 50 App. 179; Stresovich & Co. v. Kesting, 63 Mo. App. 57; State v. Green Tree Co., 32 Mo. App. 281; Freight and Cotton Press Co. v. Stanard, 44 Mo. 71; Freight and Cotton Press Co. v. Plant, 45 Mo. 517; Kerr v. Henderson, 42 Atl. 174; Trust & Savgs. Inst. v. Paper Mills Co., 43 Atl. 423; Railroad Co. v. Erwin, 9 Am. & Eng. Rd. Cas. 252; 1 Benj. on Sales, secs. 318, 337, 345 and 346; Tiedeman on Sales, sec. 93; Parker v. Rodes, 79 Mo. 88; Meyers v. Hale, 17 Mo. App. 204; Johnson, Brinkman Co. v. Bank, 116 Mo. 558. (2) Title to the coal having remained in the shippers until paid for by appellant, the issuance of the bill of lading conveyed no title to or right of possession of the coal to respondent, and he has no right of action against appellant. Halsey v. Warden, 25 Kan. 128; Bank v. Homeyer, 45 Mo. 145; Valley v. Cerre's Administr., 36 Mo. 364 (star pages 586, 587); Scharf v. Meyer, 133 Mo. 428; Bank v. Railroad, 62 Mo. App. 538; Bank v. McGraw, 76 Fed. 937; Copland v. Bosquet, 4 Wash. (C. C.) 588; Paul v. Reed, 52 N. H. 136; Cole v. Berry, 42 N. J. Law 308; Dows v. Bank, 91 U. S. 618; Hutchinson on Carriers, secs. 134, 135. (3) The court erred in refusing to give instruction No. 3 as requested by defendant. See authorities under points 1 and 2. (4) The coal was shipped to Frazier with the understanding that the railway company was surety for the payment of the purchase price, and upon payment thereof by the railway company, it became subrogated to all the rights of the vendors and Frazier could not maintain an action against the railway company without payment or tender of payment of the price of the coal. Brandt on Suretyship and Guaranty, secs. 205, 313; Ross v. Menefee, 25 N. E. 545; Mosely v. Fullerton, 59 Mo. App. 143; Bank v. Reed, 54 Mo. App. 94; Clark v. Bank, 57 Mo. App. 283; Furnold v. Bank, 44 Mo. 336; Bertheld v. Bertheld, 46 Mo. 557; Hackett v. Watts, 138 Mo. 518.

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G. R. Balthrope for respondent.

(1) The evidence unequivocally discloses the fact that the sale of the coal to plaintiff by Lambeth & Son was a time sale, a credit being extended to plaintiff for payment through the verbal indorsement of Yocom—the payment was not to be made until plaintiff received the cost bill from Joseph Lambeth of the firm of Lambeth & Son. And Yocum being the agent of plaintiff in the purchase of the coal and plaintiff being perfectly solvent the delivery by Lambeth & Son of the coal at Marceline to the defendant a public carrier, by direction of plaintiff's agent (Yocum) vested the complete title of the coal in plaintiff. Lindauer v. Maybery, 27 Mo. App. 181; State v. Wingfield, 115 Mo. 428. (2) And upon the delivery of the coal to defendant plaintiff became under the contract of purchase responsible to Lambeth & Son for the value of same, whether the coal ever reached him or not, and they could on his refusal to pay after receipt of the bill of costs of coal maintained an action against him and recovered the purchase price of the coal. Ozark Lumber Co. v. Chicago Lumber Co., 51 Mo. App. 555; Tufts v. Wynne, 45 Mo. App. 42; Brewington v. Mesker, 51 Mo. App. 348. (3) And this being an absolute sale there could be no lien for purchase price of the coal. Brown & Wright v. Barnard, 116 Mo. 674. (4) But even if Lambeth & Son had a reserved lien on the coal it would not release defendant or excuse it for its tortious acts in, as plaintiff in his testimony calls it, confiscating his coal as soon as it arrived at its place of destination, and that to without giving him even an opportunity to enter his protest, for defendant had no legal or equitable rights as a public carrier or as a surety that under any circumstances would justify it in converting plaintiff's coal to its own use. The coal having been delivered to it at Marceline for shipment over its road to plaintiff at Baring it was bound to ship and de-

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liver to him at that place. Miller v. Railroad, 14 Mo. App. 281; Prewet v. Railroad, 62 Mo. 527; Faulkner v. Railroad, 51 Mo. 34; Lander v. Railroad, 50 Mo. 346; Ranken v. Railroad, 55 Mo. 167; Buddy v. Railroad, 20 Mo. App. 206; Gregory v. Railroad, 46 Mo. App. 574. And defendant had no right to detain the coal without plaintiff's consent. Armentrout v. Railroad, 1 Mo. App. 158; Gantling v. Railroad, 60 Mo. 390. (5) The facts of the conversion being unintentional constitutes no defense. Waverly Co. v. Cooperage Co., 112 Mo. 383; Koch et al. v. Branch et al., 44 Mo. 545; Mohr v. Lougan, 77 Mo. App. 481, 489; Ess v. Griffith, 128 Mo. 62. (6) The coal having been delivered to defendant by Lambeth & Son at the direction of plaintiff's agent, Yocum, for shipment to plaintiff who was to pay for same on receipt of cost bill, the possession of defendant was simply that of a public carrier who represented plaintiff and could not conflict with plaintiff's possession or title and if it were possible to discover any thing in the evidence that would bind defendant for the payment of the coal as a surety for the purchase money when it became due it could not before plaintiff had received the cost bill from Lambeth & Son, or had any opportunity whatever to pay for the coal or the freight charges and before it had paid Lambeth & Son one cent legally converted the coal to its own use. Bank v. Fisher, 55 Mo. App. 51; Missouri Central Lumber Co. v. Stewart, 78 Mo. App. 456; Hearne et al. v. Keath et al., 63 Mo. 85; Huse v. Ames, 104 Mo. 101. (7) The petition states full facts of conversion, more than were sufficient. Knepper v. Blumenthal, 107 Mo. 665. Defendant filed no set-off or claim for money paid Landreth & Son.

REYBURN, J.—Plaintiff, a saloonkeeper, at Baring, Missouri, in November, 1901, through Yocum, local agent of defendant, verbally ordered a carload of coal to be shipped from Marceline, Missouri, by Lambeth &

Sons. The coal was shipped at Baring and a bill of lading issued, naming Lambeth & Sons as consignors and plaintiff as consignee. The consignee was unknown to the shippers, and prior to the shipment defendant's agent agreed that defendant should become responsible to consignors for the coal, if not paid for by Frazier in a reasonable time. Upon arrival at its place of destination, the coal erroneously was placed upon the defendant's chute, unloaded with its own coal, and subsequently paid for by defendant. The bill of lading was never delivered to nor in possession of plaintiff, but was in possession of the agent of defendant and plaintiff never paid, nor did he tender payment, for the coal to consignors, nor to defendant, though his testimony tended to prove that he was ready and willing to make payment of its purchase price, $2.15 per ton, on delivery or tender of the coal; he further stated in his examination in chief that the coal was worth at the time $2.75 per ton in Baring and which price he was offered for it. The railroad agent assured him he would order immediately another carload of coal and plaintiff seemed to have awaited in vain for compliance with this promise to replace the car but borrowed a ton of coal pending its arrival.

This an action by plaintiff for conversion of the carload of coal, was tried before the court, which found for the plaintiff.

It is a legal principle generally recognized, that when no express provision is made for time of payment, a sale of personalty is presumed by law to be a cash transaction, and the delivery of the property and the payment of the purchase price are concurrent and the buyer is not entitled to demand, nor to receive delivery or possession of the goods, the subject of the contract, without proffer of the purchase price or its actual payment. In the absence of other arrangement, express or implied, concerning the time of payment of the price and providing for future payment, or where the parties

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remain entirely silent respecting it, the rule is clearly established, that the sale is made impliedly for cash, and title to the property sold does not pass to the vendee until payment or tender of payment has been made. The payment of the purchase price becomes a condition precedent by legal implication, and except in the event of waiver by the vendor, title does not vest in the buyer until after performance of such condition. Those principles are upheld and asserted by an unbroken line of decisions of the appellate courts of this State, as well as by the treatises of the most eminent writers upon the subject. Tiedeman, Sales, sec. 93; 1 Benjamin, Sales (4 Ed.), 318, 345; Southwestern, etc. Co. v. Plant, 45 Mo. 517; Southwestern, etc. Co. v. Stanard, 44 Mo. 71; Hall et al. v. Railroad, 50 Mo. App. 179; Stresovich v. Kesting, 63 Mo. 57. Logically it would have followed in such event, that plaintiff, having neither the right of property in, nor the right of possession to the coal, was precluded from maintaining trover or conversion therefor; for, unless he had the legal title or the right to the possession of the coal at the time it was alleged to have been converted, he was not entitled to recover. Johnson, etc. v. Bank, 116 Mo. 558; Parker v. Rhodes, 79 Mo. 88; Myers v. Hale, 17 Mo. App. 204. Nor would the issuance of the bill of lading in plaintiff's name as consignee have conveyed to him conclusively title or right of possession to the coal; for a bill of lading is but prima facie evidence of the intent of the vendor to part with the title or interest in the property, for which it is issued, and extraneous evidence is admissible for the purposes of showing the true intent of the parties. Scharff v. Meyer, 133 Mo. loc. cit. 445. But the testimony of Joseph Lambeth established that he relied on the promise of the agent of appellant, that if the consignors did not receive payment from respondent in a reasonable time, to notify him and he would see that they got their money. This evidence, if not decisively negativing the contentions of appellant that the

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sale was made for cash, or that the consignors did not intend to have the coal delivered to Frazier until payment had been made, and that the bill of lading, in lieu of delivery to him, was sent to the agent of appellant in furtherance of the purpose that the coal should be withheld from Frazier until after he had made payment, at least, is evidence, from which it may be fairly inferred that the sale was not for cash on delivery, but to be paid for within a reasonable time thereafter; and the finding of the trial court on such issue will not be disturbed.

2. The answer was a general denial, and, therefore, defendant in this action was barred from recouping the price of the coal, which it seems to have paid consignors after this action was begun, and for the same reason no allowance for freight can be made, nor is any question of subrogation of defendant to rights of the consignor ensuing from such payment, before us. The judgment of the court for plaintiff in the sum of $63.25 finds abundant support in the testimony from which it is established beyond dispute, that defendant appropriated to its own use the carload of coal ordered by and belonging to plaintiff. Although this action of defendant may have occurred through an honest mistake of its agents regarding the ownership of the particular carload, yet plaintiff was none the less entitled to redress.

The judgment is for the right party and is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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ARKANSAS & OKLAHOMA RAILROAD COMPANY, Appellant, v. POWELL, Respondent.

St. Louis Court of Appeals, February 2, 1904.

1. **APPEALS: Statutory Right: Strict Compliance.** The right of appeal being purely statutory, a substantial, if not a literal, compliance with the statutory requirements in that respect, is necessary to confer jurisdiction upon the appellate court.

2. ———: **Affidavit, Insufficient.** An affidavit for appeal which omits the statement of affiant's belief "that the appellant is aggrieved by the judgment of the court," is deficient in statutory recitals and can not give the appellate court jurisdiction of the cause.

3. ———: ———: **Amendment.** And the appellate court has no power to make an order allowing the amendment of a defective affidavit for appeal, or the substitution of a new affidavit which will conform to the statute.

4. ———: ———: **Waiver.** Nor can the respondent waive the question of defective affidavit for appeal; or estop himself to urge its insufficiency, by appearing in the appellate court and consenting to a continuance.

Appeal from McDonald Circuit Court.—*Hon. Geo. W. Thornberry,* Judge.

APPEAL DISMISSED.

L. F. Parker, J. T. Woodruff and *John G. Egan* for appellant.

(1) The respondent has waived the question of the insufficiency of the affidavit for appeal, and has entered a general appearance by consenting to two continuances of this cause, in this court. McLeran v. Shartzer, 5 Cal. 70; Coby v. Halthausen, 16 Col. 10, 26 Pac. 148; Robertson v. O'Reilly, 14 Col. 441, 24 Pac. 560; Mitchell v. Jacobs, 17 Ill. 235; Roundy v. Kent, 75 Iowa

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662, 37 N. W. 146; Wilgus v. Gettings, 19 Iowa 82; Steven v. Nebr., etc. Ins. Co., 29 Nebr. 187, 45 N. W. 284; Overseers of Poor v. Same, 5 Cowen (N. Y.) 363; Wilson v. Kelly, 81 Penn. St. 411. (2) The respondent, by consenting that the appellant might amend the record in this court, waived the question of the defect in the affidavit for appeal, and entered a general appearance here. Price v. Railroad, 40 Ill. 44. (3) The respondent has waived the objection to the defect in the affidavit for appeal, by laches in presenting his motion to dismiss. Bombeck v. Bombeck, 18 Mo. App. 26; Yates v. Kinney, 23 Nebr. 648, 37 N. W. 590; Hanson v. Hoitt, 14 N. H. 56; Fitzpatrick v. Cottingham, 14 Wis. 219. (4) The following decisions of the Supreme Court of this State, holding that it is too late to move to dismiss when the case is submitted, are applicable to the circumstances of this case. St. L. B. & C. Co. v. Railroad, 72 Mo. 664. (5) The defect in the affidavit for appeal can be amended here, by leave of this court, by the appellant filing a supplementary affidavit, setting up the omitted statement. Sec. 673, Code Civ. Prac., R. S. 1899; Cooley v. Railroad, 149 Mo. 487; Hillebrant v. Brewer, 5 Texas 566; Norton v. Flake, 36 Mo. App. 698; Burnett v. McCluey, 92 Mo. 230; Halstead v. Mustion, 166 Mo. 488; Muldrow v. Bates, 5 Mo. 214; Cruchon v. Brown, 57 Mo. 38; Lilly v. Tobin, 103 Mo. 477; Goddard v. Williamson, 72 Mo. 131.

Geo. Hubbert, with *White & Clay* for respondent.

(1) If, as appears to be the rule, the statutory affidavit for appeal be a necessary and precedent "condition" as a jurisdictional basis therefor, there does not seem to be any lawful appeal, *nothing of which this court has any jurisdiction;* and the appeal should be dismissed. The statute requires an affidavit that "the affiant believes the appellant is aggrieved by the judgment or decision of the court" which is altogether missing

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here. R. S. 1899, sec. 808; Thomas v. Mo. Mut. Ins. Co., 89 Mo. App. 12; Schnabel v. Thomas, 92 Mo. App. 180. (2) If an appellant may leave off one-half the prescribed affidavit, another may leave off the other half; then, as well might another omit the whole. But however onerous it may seem, the law must be observed with strictness, or there can be no appeal from a circuit court judgment. State ex rel. v. Woodson, 128 Mo. 497; Clelland v. Shaw, 51 Mo. 440; Green v. Castello, 35 Mo. App. 127, 134-5. There is no power here to order amendments; no jurisdiction having been acquired. 24 Mo. App. 554; 87 Mo. App. 284.

STATEMENT.

Appellant brought this action to the August term, 1901, of the circuit court of McDonald county, upon an agreement executed by respondent jointly with other subscribers thereto, which was made an exhibit to the petition. The petition contained allegations of plaintiff's legal existence and lawful powers, and that in 1899 it located and constructed, and since completion, had continuously operated an extension of its line of railroad from the town of Gravett, Benton county, to the town of Southwest City, in McDonald county. That before beginning such extension defendant and other citizens of Southwest City and vicinity, in consideration of the benefits to be derived by them from the construction and operation of such extension, as an inducement to plaintiff to construct and operate it, executed and delivered an obligation dated March, 1899, whereby they undertook to procure free of cost to plaintiff, and at their expense, for plaintiff, depot and switching grounds at Southwest City, of the extent mentioned in such obligation, and to procure the right of way of the dimensions mentioned therein, which further provided that the liability of defendant and other subscribers should not exceed three per cent each of the aggregate cost of procuring such

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depot, switching grounds and right of way. That by terms of this obligation such depot, switching grounds and right of way were to be procured by defendant and others as required for use of plaintiff in construction of such extension, and defendant and his co-obligors were notified and procured part at their own cost, but the greater part was not procured by such obligors and plaintiff was compelled to obtain them at a cost of $2,038.26, and judgment was asked for his proportionate part against defendant.

The answer, after a general denial, in its second paragraph set forth that plaintiff had represented it would build a first class railroad from Gravett to Southwest City, equipped with steel rails and make Southwest City its terminus and base of supplies for its extension east to the zinc mines and timber lands of Arkansas for a period of not less than two years, which would be advantageous to defendant and his property, and in pursuance of such representations, inducements and considerations, defendant signed the paper sued on, but plaintiff had failed to comply in the particulars detailed with such representations and conditions, and the writing was without consideration and not binding. The third paragraph of the answer charged that plaintiff was a foreign corporation organized under the laws of Arkansas, and had never complied with sections named of the statutes of this state, and had no authority to do business or maintain an action in Missouri, and therefore plaintiff ought not to maintain its action; and that the contract was made and delivered in Missouri, and in contravention of the sections cited, and void and nonenforceable.

In reply, plaintiff pleaded that the allegations of the second paragraph of the answer constituted no defense, because they set up parol understandings made by plaintiff, at and before the execution of the contract to vary, contradict and add to such written contract; as to the third paragraph, plaintiff replied that since the institu-

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tion of the suit, it had complied with the statutory provisions of Missouri, and tendered a license required thereby, which it had received from the Secretary of State, and further averred that while the contract was executed and delivered in Missouri to plaintiff's agent, it was accepted and became a binding contract in Arkansas, and the greater part of the right of way to be procured was in Arkansas, and the greater part of the amount sued for was expended for right of way in Arkansas.

Defendant moved for and took judgment upon the foregoing pleadings, and after unsuccessful motions to set aside, in arrest, vacate and for a new trial, plaintiff sought an appeal which was granted upon affidavit as follows:

"Comes the plaintiff, the Arkansas & Oklahoma Railroad Company, a railroad corporation, by its attorney, J. A. Rice, and prays an appeal from the judgment of this court in this cause to the St. Louis Court of Appeals. And for cause and grounds of such appeal the said J. A. Rice upon oath states that he is the attorney and agent of the plaintiff, the Arkansas & Oklahoma Railroad Company, and that the appeal herein prayed for is not taken for the purpose of vexation or delay but that justice may be done the plaintiff in the premises.

"I, J. A. Rice, do solemnly swear that I am the agent and attorney of record of the plaintiff, the Arkansas & Oklahoma Railroad Company, in the above entitled cause and that the facts set forth in the above and foregoing affidavit are true.

"(Signed) J. A. Rice.

"Subscribed and sworn to before me this, the eighteenth, day of January, 1902.

(Seal) (Signed) Jno. R. Patterson, Ct. Clk."

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REYBURN, J. (after stating the facts as above).—1. The respondent before joining issue or submission of the cause, has protested against this court entertaining jurisdiction by moving to dismiss the appeal upon the two-fold ground that plaintiff, as appellant, did not comply with the condition of the statute in the form of affidavit filed, and that such affidavit appearing in the bill of exceptions was not sufficient or effective as an affidavit for appeal. Section 808, R. S. 1899, recites that no appeal shall be allowed unless, first it be made at the term at which the judgment was rendered, and second, the appellant or his agent shall, during the same term, file in the court his affidavit, stating that such appeal is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment of the court. The right of appeal in civil actions was unknown to the common law, and is wholly of statutory origin, and it is therefore essential in the exercise of the right that the statutory requirements be strictly complied with. State ex rel. v. Woodson, 128 Mo. 497. In appeals from one court to another, it is essential to the jurisdiction of the appellate tribunal, that the appeal was perfected in the manner prescribed by law, and unless so taken, the appellate court has no jurisdiction to proceed to an examination of the merits, but must dismiss the appeal or affirm the judgment as the statute may determine. Green v. Castello, 35 Mo. App. 127. A substantial if not literal, compliance with the statute is required and numerous cases might be invoked to that effect. DeBolt v. Railway, 123 Mo. 496; Thomas v. Ins. Co., 89 Mo. App. 12. Where an affidavit departed from the statutory phraseology in that the agent of appellant, the affiant, considered himself aggrieved, such form was declared worse than defective and no affidavit except in name. Schnabel v. Thomas, 92 Mo. App. 180.

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The affidavit upon which the appeal to this court was allowed is so signally deficient in the statutory recitals demanded, that the case is before the court as if no affidavit had been filed. Nor has this court any power or authority to make any order respecting the amendment of the affidavit or substitution of an affidavit conforming to the statute. The jurisdiction of this court can not attach except by appeal or upon writ of error, and the filing of an affidavit in statutory form is an essential jurisdictional act, which can not be supplied in the appellate court, which in absence of such affidavit never acquired jurisdiction. Nor can the respondent, impliedly from his actions or expressly by direct stipulation, waive such question or estop himself from urging the insufficiency of the affidavit for appeal, by appearing in this court, consenting to continuance, or by other act on his part; jurisdiction can not be conferred by consent, and if a waiver of one mandatory requirement of the statute could be made, waivers respecting any or all other jurisdictional acts or conditions would have to be recognized and tolerated. Giesing v. Schowengerdt, 24 Mo. App. 554; Peters v. Edge, 87 Mo. App. 283. As this court is wholly without jurisdiction of the cause, it will be stricken from the docket. *Bland, P. J.*, and *Goode, J.*, concur.

LINCK, Respondent, v. VORHAUER, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **LIMITATIONS: Coverture.** The statute of limitations does not run against a wife, who sues for the alienation of her husband's affections, as long as she is not divorced, although she is separated from him.

2. **Alienation of Affections: Evidence: Res Gestae.** In an action by a wife for the alienation of her husband's affections, evidence of improper relations between the defendant and the husband, one and two years before the separation of husband and wife, where the intimacy continued down to the separation, was prop-

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erly admitted because part of the *res gestae*, and because proper for the purpose of explaining the subsequent conduct of the parties.

3. ———: Damage to Plaintiff's Character. An instruction requiring the jury to take into consideration damage to plaintiff's character was properly given.

Appeal from St. Louis Circuit Court.—*Hon. J. W. McElhinney,* Judge.

AFFIRMED.

Ed. L. Gottschalk and *Thos. H. Sprinkle* for appellant.

(1) Plaintiff's alleged cause of action is barred by the statutes of limitations. R. S. 1899, sec. 4273; Brockman v. Ritter, 21 Ind. App. 250. The cause of action accrues when plaintiff first had a legal right to sue. Schade v. Gehner, 133 Mo. 252; Rankin, Jr., v. Schaeffer, 4 Mo. App. 108; Rowsey v. Lynch, 61 Mo. 560; 19 Am. & Eng. Ency. of Law (2 Ed.), 193; Bird v. Railroad, 30 Mo. App. 365; Bunten v. Railroad, 50 Mo. App. 414; Powers v. Railroad, 158 Mo. 87. (2) Two years prior to wrongful acts is too remote. People v. Hendrickson, 53 Mich. 525. Proof of adultery is inadmissible unless pleaded. 15 Am. & Eng. Ency. of Law (2 Ed.), 863. Inference upon inferences not permissible. Gaskill v. Lead & Zinc Co., 84 Mo. App. 521; Dill v. Railroad, 37 Mo. App. 458; Yarnell v. Railroad, 113 Mo. 580; State v. Lackland, 136 Mo. 32; Lenox v. Harrison, 88 Mo. 496; Bigelow v. Railroad, 48 Mo. App. 371; Chemical Co. v. Railroad, 78 Mo. App. 312; Glick v. Railroad, 57 Mo. App. 97. (3) Damage to character not measure of damages. (4) Mere alienation of affections is not sufficient, but something further tending to prevent or dissuade the husband from living with the wife is requisite. Modisett v. McPike, 74 Mo. 647; 15 Am. and Eng. Ency. of Law (2 Ed.), 865 and 866.

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Henry H. Oberschelp and *Arthur Digby* for respondent.

(1) So long as the marriage exists, any interference with the wife's enjoyment of her husband's society, support, protection, comfort and affection is actionable, and enforceable even by injunction. Ex parte Warfield, 40 Tex. 413, 76 Am. St. 724. (2) If an act is wrong at the outset, its continuance can not become rightful. Wells v. New Haven & Northampton Co., 151 Mass. 46, 21 Am. St. 421. (3) The petition alleges continuing and recurring wrongs, in which cases plaintiff can recover for damages sustained since five years prior to the filing of the petition. 19 Am. & Eng. Enc. of Law (2 Ed.), 201; Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co., 79 Wis. 297; Barclay v. Grove, 11 Atl. 888; Lentz v. Carnegie, 145 Pa. St. 612; Colrick v. Swinburne, 105 N. Y. 503; Reed v. State, 108 N. Y. 408; Smith v. Sedalia, 152 Mo. 283, 300. (4) Where a course of conduct is shown to exist, it is proper to prove acts committed at its commencement. Previous acts may be proven as explaining or giving color to subsequent acts. State v. Clawson, 32 Mo. App. 93, 97; 30 Mo. App. 139, 143; State v. Coffee, 75 Mo. App. 88, 91; Law of Presumptive Evidence (Lawson), 223, 219, 228. (5) Plaintiff's allegations of inducement were sufficiently specific. Nichols v. Nichols, 134 Mo. 191. (6) It was proper to use the words "character" and "condition" in defining the measure of damages. Hartpence v. Rogers, 143 Mo. 623, 635, 636; Modisett v. McPike, 74 Mo. 641. (7) A retrial of this case should not be ordered unless positively necessary. Broyhill v. Norton, 74 S. W. 1024, 1025; R. S. 1899, sec. 865.

BLAND, P. J.—Since the judgment appealed from was recovered in the circuit court, the defendant has intermarried with Edward C. Linck, and the name, Dora Linck, as defendant, has been substituted in this court

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for that of Dora Vorhauer and the style of the cause changed to correspond with the change in the name of the defendant.

This is an action instituted by the plaintiff for the alienation of the affections of plaintiff's husband. The material allegations of the petition are that the plaintiff was married to Edward C. Linck on July 23, 1879, and continued to live with him until the seventh day of August, 1895.

"That during all that time she and her said husband enjoyed the aid, support, protection, comfort, companionship, society and affection of each other; that defendant well knowing that plaintiff and Edward Linck were husband and wife, and that they were living happily together, enjoying the aid, support, companionship society and affection of each other, wrongfully contriving and intending to injure plaintiff and deprive her of the comfort, society, affection, protection and support of her said husband; did on the seventeenth day of August, 1895, wickedly induce said Edward Linck to abandon and desert plaintiff to live with the defendant, and to neglect to support plaintiff properly;" and said husband being so influenced did leave and abandon plaintiff. "That defendant has ever since continued and still continues to entice, influence and induce said Edward Linck to remain away from plaintiff and not to support her and not to bestow upon her such affection as he formerly did, and that he lives with defendant."

That said Edward Linck, under this influence, has failed to support plaintiff or bestow upon her such affection as formerly but has lived and still lives with the defendant. "That ever since said abandonment the defendant has wrongfully, wickedly and maliciously detained and harbored plaintiff's husband, and has kept him separate and apart from plaintiff, and has, by her said wrongful, wicked and malicious acts and conduct deprived plaintiff, and still deprives her of the aid, support, protection, comfort, companionship, society and

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affection of her husband,'' for which plaintiff claims $10,000 actual and $5,000 punitive damages.

Defendant's answer is, first, a general denial; second, a plea of five years statute of limitations; third, that whatever alienation of affections arose they were caused by the misconduct and acts of the plaintiff, and various efforts of reconciliation between the parties were set out.

The reply is a general denial.

Plaintiff and Edward C. Linck were married in July, 1879, and finally separated August 17, 1895. Four children were born of the marriage, two of whom are living, a boy and a girl.

The jury found the issues for the plaintiff and assessed her damages at four thousand dollars, but allowed her no punitive damages. To avoid the awarding of a new trial, plaintiff entered a remittitur of fifteen hundred dollars and judgment was rendered in her favor for twenty-five hundred dollars. Defendant appealed from this judgment.

1. Defendant insists that the case falls within the five years statute of limitations. It is both averred and admitted by plaintiff that her final separation from Edward C. Linck took place more than five years prior to the commencement of the suit, and that they never thereafter lived together as man and wife. The evidence tends to show that for the first year or two after the separation Linck cohabited with the defendant, and finally took up his residence with her and continued to reside with her down to the day of the trial. It further shows that Linck's intimacy with the defendant was the entering wedge, if not the sole cause of the separation between himself and wife. After the separation he brought three successive suits against plaintiff for divorce, in all of which he was unsuccessful. The evidence, therefore, is conclusive that plaintiff had information before and at the time of the separation of Linck's associations with the defendant, and the plea of

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fraud or concealment would not be available to her as a defense to the running of the five year statute of limitations if the statute is applicable to her. Sanborn v. Gale, 26 L. R. A. (Mass.) 864. But being the wife of Edward Linck, she was under the disability of coverture and was expressly exempt from the operation of the statute of limitations. Section 4279, R. S. 1899; Lindell Real Estate Co. v. Lindell, 142 Mo. 61; Reed v. Painter, 145 Mo. 341; Linville v. Greer, 165 Mo. 380.

2. Hartman, a witness for plaintiff, testified that he worked for her husband, Edward C. Linck (in the paper hanging business), during the years 1893 and 1894; that during the time he worked for two and one-half weeks papering the defendant's house. He said: "Mr. Linck did not assist me with the work. He was around the house. I went to him, or looked for him for directions in regard to my work. I found him downstairs on the first floor. I knocked at the door. He came out of the bedroom into the kitchen. It was Mrs. Vorhauer's bedroom. Nobody but Mrs. Vorhauer was with Mr. Linck. She was right behind him after he got out. She was dressed in a white gown and a white wrapper. A loose gown. This was on Jefferson avenue, and I believe Hebert street. It was right on the corner. Of course the corner was grocery store and saloon and her house was right next door. It was on the east side of Jefferson avenue. I saw Mr. Linck there every day that I worked there, and after I had that job done I had to go to Mrs. Vorhauer's house to find him. I found him there about nine out of every ten times. One day I went down there and I rang the bell and I went back to the kitchen. Then I went alongside the house and I seen that the curtain was up about six inches high, and I looked in there and I saw them both in bed. There was a cover on them. They were both in the same bed. I saw them at the Cottage in Forest Park. They drove out in a buggy. There was no one with them. She was a married woman at that time. Her husband's name

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was Conn Vorhauer. After that if I wanted Mr. Linck I had to go and see what I needed at the store, you know. I never found him at the store, and I would go and find him at Mrs. Vorhauer's residence."

The defendant objected to this evidence on the ground that it was too remote from the time of the separation of Linck and his wife. The objection was overruled, to which ruling defendant duly saved his exceptions and assigns here the admission of this evidence as error. His argument is that the evidence tends to contradict the allegation of plaintiff's petition that she and her husband had lived happily together until August, 1895, two years or more after the scenes testified to by Hartman, and that the transaction was not part of the *res gestae* and was too remote. The alienation which caused the separation of Linck from his wife on August 17, 1895, was not the result of one act, but of a continuous course of wrongful conduct dating back to the inception of the intimacy between the defendant and Edward Linck. The evidence shows that the intimacy to which Hartman testified was at no time thereafter broken off, but continued down to the day of separation and to the day of trial, and we think it was competent to show the intimacy for the entire period for the purpose of proving the alleged alienation of the affections of Edward Linck from his wife, and his bestowal of them upon the defendant. State v. Coffee, 75 Mo. App. l. c. 91. The acts of intimacy, testified to by the witness, were shown to have continued down to the separation, therefore, they had a causal connection with the wrong alleged and were of the procuring cause of the alienation and served to explain and illustrate the means by which the defendant brought it about. We think for these reasons, they were a part of the *res gestae* of the transaction. Wharton on Evidence, sec. 262; Taylor on Evidence (8 Ed.), sec. 588; 1 Greenleaf on Evidence, sec. 108; Harriman v. Stowe, 57 Mo. 93; Louisville, New Albany & Chicago Ry. Co. v. Wood, 113 Ind.

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544; Miller v. Feenane, 50 N. J. L. 32; Alabama Great Southern R. R. Co. v. Hawk, 72 Ala. 112. The evidence was admissible also under the rule that when a course of conduct is shown to exist, it is proper to prove acts committed at its commencement for the purpose of explaining the subsequent conduct. State v. Clawson, 32 Mo. App. 93.

3. On the measure of actual damages the court gave the following instruction:

"1. If you find from the evidence, in favor of the plaintiff, you will assess the actual damages sustained by her, at such sum as will compensate her for the injury, if any, sustained by her as a result of the conduct of defendant in the loss of the support, protection, comfort, society and affection of her husband, in case and so far as you may find there has been such loss, and the wrong and injury, if any, done to her feelings, character and condition, on and after the twenty-first day of March, 1898, but for no injury or loss prior to that time."

This instruction is objected to for the reason the jury was authorized in assessing the damages to take into consideration damage to plaintiff's character. Defendant's contention is that the damage should have been restricted to the loss of *consortium*—loss of the conjugal society, affection and support of her husband. In Hartpence v. Rogers, 143 Mo. 623, it was held that in a suit by a husband against the defendant for alienating his wife's affections, the disgrace and dishonor cast upon him might be considered by the jury in assessing the damages, and in the case of Modisett v. McPike, 74 Mo. 636, where a like instruction in a similar case was given, was approvingly cited.

Discovering no reversible error in the record, the judgment is affirmed. *Reyburn* and *Goode, JJ.*, concur.

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BRISTOL, Respondent, v. THOMPSON, Appellant.

St. Louis Court of Appeals, February 16, 1904.

JURISDICTION: Court of Appeals: Ejectment. An action for the value of improvements, under section 3072, Revised Statutes 1899, is a continuation of the ejectment suit out of which it grows, and the court of appeals has no jurisdiction of the subject-matter.

Appeal from Douglas Circuit Court.—*Hon. Asbery Burkhead,* Judge.

TRANSFERRED TO SUPREME COURT.

J. S. Clarke for appellant.

BLAND, P. J.—The plaintiff, who was an unsuccessful defendant in an ejectment suit, proceeded under section 3072, R. S. 1899, to recover the value of improvements made by him upon the land. He recovered in the circuit court and defendant appealed to this court. In Stump. v. Hornback, 109 Mo. l. c. 279, it is said: "The proceedings to recover for improvements were designed merely to supplement and continue the ejectment suit out of which they grew, and enforce the equities of the occupant before the judgment in the original suit had been executed." This court has no jurisdiction in an ejectment suit. This proceeding being a continuation of the ejectment suit, it must follow that this court has no jurisdiction over the subject-matter of this suit. The appeal is therefore transferred to the Supreme Court. *Reyburn* and *Goode, JJ.,* concur.

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HUNT, Respondent, v. THE DESLOGE CONSOLIDATED LEAD COMPANY, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **FELLOW-SERVANT.** Where the superintendent of a mill put the employees under the control of a shift boss whose duty it was to direct them when and how to work, whose orders they were required to obey, the boss represented the company operating the mill and was not the fellow-servant of the employees under him.

2. **EVIDENCE: Assumption of Risk: Notice to Employer of Employee's Inexperience.** In an action for damages sustained by plaintiff in the death of her husband, who lost his life by reason of being put to work by defendant in an unsafe place, where the answer sets up assumption by deceased of the risk incident to the employment, and the evidence shows deceased was wholly inexperienced in that line of work, it was not error for the trial court to permit a witness to testify that he told the boss in charge deceased was a "green hand" and it was not safe to put him at such work.

3. **———: Opinion of Witness.** Nor was it error for one witness to state what he thought the boss meant by certain directions given to him (the witness) where the evidence shows that such directions could have meant nothing else.

4. **———: ———: The Usual Method of Doing Work.** Nor was it error to show the usual method of doing the work which deceased was put to do, and that it was unsafe to do it in the condition the place was in, when the facts showed that it was unsafe.

5. **INSTRUCTIONS: Correct as a Whole: Judgment for Right Party.** Although the wording of some of the instructions is open to criticism, yet, when all considered together, they are substantially correct, and the verdict was manifestly for the right party, the judgment will be affirmed.

Appeal from St. Francois Circuit Court.—*Hon. Robt. A. Anthony,* Judge.

AFFIRMED.

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Merrifield W. Huff for appellant.

(1) The court erred in allowing Frank Burlbow, one of plaintiff's witnesses, over the objection of defendant to tell the jury of his having called Sherin's attention to the fact that deceased Hunt was a green man and that it was not safe for him to work at the ash-pit. Gutridge v. Railroad, 94 Mo. 468; Boettger v. Scherpe, etc., Iron Co., 136 Mo. 531; Langston v. Railroad, 147 Mo. 457; Nash v. Dowling et al., 93 Mo. App. 156; King v. Railroad, 98 Mo. 235. (2) The court erred in allowing Beaumont to state what he thought Sherin meant by certain directions alleged to have been given to him. Pugh v. Ayres, 47 Mo. App. 598. (3) The court erred in allowing witness Longrear over defendant's objection to tell the jury what had formerly been his custom as to cleaning the ash-pits and also allowing this witness to tell the jury that it was unsafe to allow Hunt to go into the pit as he did. (4) The court erred in refusing to sustain defendant's objection to the testimony both at end of plaintiff's case and at the end of the whole case. Parker v. Railroad, 109 Mo. 362; Foster v. Railroad, 115 Mo. 165; Sullivan v. Railroad, 97 Mo. 113; Sherrin v. Railroad, 103 Mo. 378; Marshall v. Schricker, 63 Mo. 308; Schaub v. Railroad, 106 Mo. 74; Card v. Eddy, 129 Mo. 510; Hawk v. McLeod, 166 Mo. 121. (5) The court erred in giving plaintiff's instruction numbered 2, for the reason that said instruction tells the jury that defendant is guilty of negligence and plaintiff entitled to a verdict, provided defendant's agents (whether vice principal or fellow-servant) directed Hunt to go into the pit. This instruction is misleading and not cured by any subsequent one. Voegeli v. The Pickle Mfg. Co., 49 Mo. App. 643; Mansur v. Botts, 80 Mo. 657; McNichols v. Nelson, 45 Mo. App. 446; Carder v. Primm, 60 Mo. App. 423; Linn v. Massillon Bridge Co., 78 Mo. App. 111; Land & Lumber Co. v. Moss Tie Co., 87 Mo. App. 167. (6) This

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instruction is further incorrect for the reason that it calls for a verdict of the hypothetical case and at same time in no way calls attention to the proximate cause of the injury. The negligence was clearly not in ordering Hunt into the pit, but in turning the water into the pit, thus generating steam, by which Hunt was scalded. Henry v. Railroad, 76 Mo. 288; Hanlan v. Railroad, 104 Mo. 381; Railroad v. Henderson, 134 Ind. 636; Conger v. Railroad, 86 Mich. 76; Kevern v. Mining Co., 70 Cal. 392; Brown v. Railroad, 20 Mo. App. 226. (7) The evidence does not show Sherin to have been a vice principal. Particularly he was not a vice principal so far as his acts were concerned and hence instruction numbered 5 is erroneous. Rowland v. Railroad, 20 Mo. App. 463; Moore v. Railroad, 85 Mo. 588; Hoke v. Railroad, 88 Mo. 370; Miller v. Railroad, 109 Mo. 356; Garland v. Railroad, 85 Mo. App. 579.

J. N. Burks, Jerry B. Burks and *Pipkin & Swink* for respondent.

(1) It was not error to show that the foreman of the boiler cleaning force was notified that the deceased was an inexperienced man, under the pleadings in this case. Donahoe v. Railroad, 83 Mo. 543. The authorities cited by appellant under its first assignment do not apply to this case. The statement of the witness, Burlbow, was as to an actual fact and was not opinion evidence. On the other hand, the mill boss, Flack, a witness for defendant, admits that he knew deceased was a new man, and yet he permitted him to be placed at a dangerous work without instructions or warning. (2) The response of witness Beaumont in answer to the question of counsel as to what was his understanding of the language of foreman Sherin, directed to him and deceased can in no way prejudice defendant and is not reversible error. Shortel v. City of St. Joseph, 104 Mo. 114; Halliburton v. Railroad, 58 Mo. App. 27. (3)

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Counsel for appellant misconceives the purport of instruction No. 3, on the question of assumption of risk, given at request of plaintiff. In any event it is not open to the objection leveled against it. The testimony shows that deceased was inexperienced and knew nothing about the ash-pit, and his only opportunity for knowledge of its condition was during the period he was working at it just prior to his injury. The latter part of this instruction presents this phase of the case to the jury. Halloran v. Iron & Foundry Co., 133 Mo. 407; Watson v. Coal Co., 52 Mo. App. 366; Riechla v. Gruensfelder, 52 Mo. App. 43; Beard v. Car Co., 63 Mo. App. 382. (4) Instruction No. 5 correctly states the rule as to what constitutes a vice principal, and we here again say that under the well-considered cases in this State and by the greater weight of authority, this man, Sherin, was a vice principal or *alter ego* of the company and performing a duty (in directing the men where and how to work) that was personal to the company. The superintendent was absent on this occasion, and it is conceded by defendant that Sherin had the right to direct and control the work and show the men where to work and was told by the mill boss on this occasion to scatter his men and get his work done. Bane v. Irwin, 172 Mo. 307; Steube v. Iron & Foundry Co., 85 Mo. App. 640; Cox v. Synite Granite Co., 39 Mo. App. 424; Haworth v. Railroad, 94 Mo. App. 215; Grattis v. Railroad, 153 Mo. 380; Glover v. K. C. Bolt & Nut Co., 153 Mo. 327; Miller v. Railroad, 109 Mo. 345; Dayharsh v. Railroad, 103 Mo. 570.

BLAND, P. J.—The defendant is engaged in mining and reducing lead ores in St. Francois county, Missouri, and has over its mine a large mill or reduction works. To generate steam to propel the machinery of the mill, it has a boiler or battery room located forty or fifty feet from the mill. In this boiler room are three boilers, two of the Heine, and one of the Babcock make,

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with separating or partition walls between. There is a space of about four feet between the rear of the Heine boilers and the rear brick wall of the engine room. The boilers are fed from the front and cleaned from the back. Back of these two boilers is a stage or platform four feet above the ground, on which the men stand to clean out the boilers. Under this stage, immediately behind the boilers, is an ash-pit six by eight feet which is entered by a manhole under the stage, and on a level with the ground surface. The wall separating the ash-pit and the fire chamber is called a bridge wall and is so constructed that the flames and smoke from the fire chambers pass over it, carrying the ashes from the furnace and dropping them into the ash-pits. The ashes are allowed to accumulate in the pits for three weeks before they were cleaned. These ashes were very hot, and the usual and safe way to clean them out was to turn water into the pits and cool them down and then shovel them out with a long-handled shovel. On August 11, 1901, (which was Sunday), Frank Hunt, plaintiff's husband, a newly employed hand, with J. A. Beaumont, was directed to take the ashes out of one of these pits. Hunt entered the pit through the manhole, a hose was handed to him by Beaumont, water was turned on and in a few minutes Hunt came out of the manhole so badly burned and scalded that he died on the following Wednesday. Plaintiff, who is Hunt's widow, sued to recover damages sustained by reason of the death of her husband which she alleges was occasioned "solely by the negligence, carelessness and recklessness of the defendant company in that it negligently failed to furnish and provide him a reasonably safe place in which to work; negligently failed to have the ash-pit and ashes therein sufficiently cooled before directing said Hunt to enter the ash-pit; negligently caused the water to be turned into the pit while the ashes were hot and negligently ordered said Hunt into a dangerous and unsafe place to work, knowing at the time he was not familiar

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with the work required of him; negligently employed and retained in its employ incompetent and inexperienced help to assist said Hunt, and negligently and knowingly retained in its employ as foreman of said work the aforesaid Sherin who was incompetent, inexperienced and unfamiliar with the work required of him."

She further alleges, "that defendant knew of the unsafe and dangerous condition of said pit; that it was unsafe for her husband to enter the same; knew that the colaborers with Hunt were inexperienced and incompetent, and knowing these facts, retained them in its employ. And alleges that had defendant used due care and caution such as was incumbent upon it and provided a reasonably safe place for her husband to work, that he would not have been killed."

Defendant's answer was a general denial and the following plea of contributory negligence:

"Further answering, defendant alleges that plaintiff's husband was a man of mature years, good judgment and a good degree of experience in life; that he well understood the business he was engaged in; that he knew whether it was safe for him to enter the place where he met with the accident that resulted in his death notwithstanding which he, of his own volition, entered into the place where he received the injuries which resulted in his death; that he entered the same of his own accord and without any command or direction from the defendant; wherefore, defendant alleges that he assumed the risks attending such actions and conduct and is therefore estopped from asserting any claim for the injuries, and prays judgment."

The new matter alleged in the answer was put at issue by a reply. The jury found for plaintiff and awarded her three thousand dollars damages. After unavailing motions for new trial and in arrest of judgment, defendant appealed.

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The evidence shows that John Cline was superintendent of the mill. He had under him two shift bosses —George R. Flack and Ike Meadows. Cline was out of the State on August 11, 1901, and Flack was discharging the duties of superintendent of the mill. Meadows did not appear on the scene. It was the custom when it became necessary to clean out the boilers and ash-pits to select a Sunday for that purpose and for the person who was put in charge of the cleaning to send to the mill boss for five or six hands to do the work. Some one who worked in the boiler room and understood or was supposed to understand how the work of cleaning should be done, superintended the work by directing the men when and how to work. On the Sunday Frank Hunt was fatally injured, John Sherin was placed in charge of the men by Flack and directed to scatter his men. Flack testified that it was Sherin's duty to put the men to work and show them how to do it, but that he had no authority to discharge them; that if a man disobeyed his orders all he could do would be to report the fact to the mill boss; that he was expected to look after the work; that if there was an inexperienced man in the bunch he was not to be put in a dangerous place, that the orders of the company were that no one in the employ of the company had any right to put a man where he would be in danger of getting hurt. There was other evidence to the effect that Sherin had authority to, and did, on the eleventh day of August, superintend the cleaning of the boilers and ash-pits and directed the men where they should work.

Beaumont, a witness for plaintiff, testified that while he was working in front of the batteries, Sherin came around and ordered him to go and help clean out one of the ash-pits; that he went and when he got there he found Frank Hunt; that he never was at the ash-pit before and had never seen Hunt there until that time; that to get into the ash-pit you had to get on your hands and knees and crawl through the manhole; that he

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and Hunt were told by Sherin that one of them would have to go into the ash-pit, and Sherin brought a pump suit (rubber); that he and Hunt both hesitated, that it was a dark looking place, but Hunt finally took the suit and put it on and went into the pit through the manhole. Sherin then told him to hand the hose to Hunt and to tell Hunt not to throw water against the bridge wall, and that he (Sherin would turn on the water; that he handed Hunt the hose, and Sherin went toward the pump, and very soon Hunt came out of the ash-pit hallooing and was badly burned; that at the time steam and ashes were coming out of the manhole; that Sherin was present when Hunt went into the pit; that he (witness) had looked into the ash-pit before Hunt entered it and there was a wet space inside a little larger than the manhole.

Thomas Emory, a witness for the plaintiff, testified that he heard Flack tell Sherin he thought it would be too hot to work in the ash-pit or boilers until the afternoon when Sherin stepped up and turned on the hose; that this was after Flack had ordered Sherin to scatter his men and after Flack and Beaumont had gone from the front end of the boilers.

The evidence further shows that Hunt had been a farmer, living and working on a farm, and that he had worked for the defendant only one day previous to the day he was scalded, and was inexperienced about mining or mill work. The evidence also shows that Sherin was in Farmington (where the case was tried) on a day during the progress of the trial but he was not produced as a witness by defendant nor was his absence accounted for.

Frank Burlbow, a witness for plaintiff, testified over the objection of the defendant, that he told Sherin that Hunt was a "green hand" and that it was not safe for him to work in the ash-pit. Silas Longrear, over defendant's objection, testified as to what had been the custom in cleaning the ash-pits, and that it was unsafe

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to enter the pit until the ashes had been thoroughly cooled down.

It was shown that plaintiff was the wife of the deceased Hunt.

At the close of plaintiff's evidence and again at the close of all the evidence, defendant moved for peremptory instructions to find for it which the court refused.

For plaintiff the court gave the following instructions:

"1. You are instructed that if you shall find from the evidence in this cause that on or about the eleventh day of August, 1901, the deceased Frank Hunt, was an employ of defendant and was as such engaged in cleaning out the ash-pit in the rear of one of defendant's boilers, and that while doing said work he received certain scalds, burns and injuries on account of water being turned into and on the hot ashes in said pit contained, and that said Hunt thereafter on the fourteenth day of August, died from the injuries so received and shall further find that the injuries by him were the direct result of defendant's negligence, if any, as hereinafter defined and that such injury was not the result of any negligence of deceased directly contributing thereto at the time, and shall further find that said Hunt was the husband of plaintiff at the times heretofore stated, then your verdict shall be for the plaintiff in such sum as in your judgment would be a fair compensation to her for the loss of her husband, not exceeding five thousand dollars.

"2. You are further instructed that if you shall find from the evidence that defendant, by its agents, directed plaintiff's husband to go into the ash-pit to clean it out and knew at the time, or by the exercise of reasonable care could have known, that the ash-pit contained large quantities of hot and smouldering ashes and that they had not been sufficiently cooled, and that it was therefore dangerous and unsafe for Hunt to do the work

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in the manner in which he did, then you are warranted in finding defendant guilty of negligence, and the plaintiff is entitled to recover, unless you should further find that Hunt was guilty of negligence in doing the work in the manner and under the circumstances in which he did.

"3. You are further instructed that if defendant knew or by the exercise of reasonable care, could have known, that the ash-pit in which the deceased was at work contained hot and smouldering ashes and was in a dangerous condition, if you should find that it was in fact dangerous, when deceased entered it, and shall further find that deceased was unfamiliar with the special work required of him and did not know the condition of the ash-pit and the danger attending upon the use of it in the manner in which he did, then and in that event he did not assume the risk of injuries arising from doing the said work unless you should find that the danger was so obvious and glaring, considering the position in which deceased was placed and his time and opportunity for discovery, that no prudent man under the same conditions and circumstances could have failed to discover said danger.

"4. You are further instructed that although you may believe from the evidence that when the deceased went into the ash-pit he knew or by the exercise of reasonable care could have known that there was danger in doing so, but if owing to the order of his superior to enter the pit (if you find that he was so ordered) he had reason to believe that he could with safety do the work by the exercise of reasonable care on his part, or if the danger was not so obvious or apparent that a reasonably prudent man similarly situated would have refused to obey the order and shall find that deceased in obeying said order did exercise all the care incident to the conditions in which he was placed, then the deceased was not guilty of such contributory negligence as to defeat a recovery by plaintiff.

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"5. You are further instructed that if you shall find from the evidence that Flack and Sherin, or either of them, was a foreman of defendant having charge of the work being done in its combustion chambers and in control and supervision of deceased and other employes there at work, and as such foreman, had authority to direct them in their work to be done, then and in that event they, or either of them, so invested with such power was a vice principal of defendant, and the acts, orders and directions of either of them so invested with such power, was the act of defendant, and their negligence or the negligence of either, if any, was the negligence of the company.

"6. You are instructed that if you shall find from the evidence in the case, that the injury to, and death of Hunt was caused solely by the combined negligence of defendant and a fellow-servant of deceased, the plaintiff is entitled to recover, and though you should find that his death was caused solely by the negligence of a fellow-servant, still if you should further find that such servant was inexperienced and unfamiliar with the work of cleaning combustion chambers, and shall further find that defendant, its officers or agents knew, or by the exercise of reasonable care, could have known that such servant was incompetent to do the work of cleaning combustion chambers when it employed and placed him at such work, then you are justified in finding defendant guilty of negligence, provided you should further find that deceased did not know of such incompetency or could not have known of it by the exercise of reasonable care on his part.

"7. You are further instructed that it was the duty of defendant to make or cause to be made the ash-pit in which Hunt was burned reasonably safe for use before causing him to enter the same, if in fact the company or its agents did direct him to go into same, and if you shall find that the duty to make or cause to be made, the ash-pit reasonably safe to work in, was

placed by defendant upon John Sherin, one of defendant's employees and that such employee failed or neglected to cool, or cause to be cooled, the ashes and make the pit reasonably safe for use, then the failure or neglect of John Sherin was the negligence of the company, and if you shall find that deceased had no knowledge or notice of the condition of said pit in time to avoid the injury he received, then and in such event the defendant was guilty of such negligence as to warrant a recovery by plaintiff."

1. We think the court properly denied the defendant's peremptory instructions to find for it. The evidence shows that Hunt was a "green hand," had never worked at the defendant's ash-pits, knew nothing of their construction or the danger there was in entering one of them, and that he went into the pit in obedience to Sherin's orders, presumably believing it safe, and either Sherin or Flack turned on the water after he had entered the pit and the hose had been handed to him by Beaumont. It is admitted that Flack at the time was acting as superintendent of the mill and it is shown that Hunt and others employed in cleaning the boilers and ash-pits were placed by Flack under the control of Sherin whose duty it was to direct them when and how to work. They were, therefore, under his immediate control and supervision and were required to obey his orders in the performance of this particular work, hence, he represented the company and was not a fellow-servant of Hunt or of the other employees over whom he was given control. White v. Kehlor, 85 Mo. App. 559; Steube v. Iron & Foundry Company, 85 Mo. App. 640; Zellars v. Missouri Water & Light Company, 92 Mo. App. 107; Kelly v. Stewart, 93 Mo. App. 47; Haworth v. Railroad, 94 Mo. App. 215; Grattis v. Railway, 153 Mo. 380; Bradley v. Railway, 138 Mo. 293.

2. The evidence of Burlbow, that he called Sherin's attention to the fact that Hunt was a "green hand" and it was not safe for him to work in the ash-pit, was

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not prejudicial to defendant, for the reason it is abundantly shown by other evidence that Hunt was a "green hand" which fact was known or should have been known to Sherin, and that it was not only dangerous for a "green hand," but dangerous to place an experienced man or any one in the pit at the time and under the circumstances existing when Hunt was required to go into it.

3. Beaumont's testimony, that when Sherin handed him the hose and told him to hand it to Hunt, he thought he meant to hand it to him in the pit, was not prejudicial for the reason his evidence shows that Sherin knew that Hunt was in the pit and that he directed Beaumont to hand the hose to Hunt after he had entered the pit and what he thought about it is of no consequence, for the facts are as he thought, and there can be no other meaning to the words and conduct of Sherin than that Beaumont should hand the hose *into the pit to Hunt.*

4. It was not error to permit the witness, Longrear, to testify as to the usual method of cleaning the ash-pit and to state that it was unsafe for Hunt to go into it in the condition it was then in, for it is shown beyond the shadow of a doubt that there was no other way to make it safe to clean out the ashes than by first turning in water and cooling them down, and it was not prejudicial but rather favorable to the defendant that this had been the uniform custom; nor was it prejudicial to permit the witness to state, what every man who heard the evidence must have known, that it was not safe to go into the pits when they were full of red hot ashes and then turn water on them.

5. The instructions given for the plaintiff are criticised by the defendant. An examination of them has satisfied us that, while the wording in some of them is open to criticism, yet when they are all considered together they are substantially correct and properly declare the law of the case as made out by the plaintiff. No error is assigned for refusing some of the instruc-

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tions asked by the defendant. Those given for the defendant were as favorable to it as the facts of the case would permit.

The evidence in the cause presents one of the most lamentable deaths caused by the most inexcusable negligence (to call it by no harsher name), it has ever fallen to our lot to examine. The conduct of Sherin in ordering Hunt into the pit filled with three weeks accumulation of hot smouldering ashes and then turning water on them, can be accounted for on no other theory than that he was either ignorant of the work he was chosen to superintend or was reckless of the safety and lives of the men over whom he was given control. The defendant company, it seems from the evidence, gave orders that none of its employees should be required to work in a place of danger. It made a mistake in selecting Sherin as a boss to oversee men in the cleaning of its boilers and ash-pits. His negligence or recklessness caused the death of Hunt, to whom no contributory negligence can be attributed under the evidence in the case, and the defendant should respond in damages occasioned by the negligence of its ill-selected boss.

The judgment is clearly and unmistakably for the right party and is affirmed. *Reyburn* and *Goode, JJ.*, concur.

LADD et al., Plaintiffs in Error, v. WILLIAMS, Defendant in Error.

St. Louis Court of Appeals, February 16, 1904.

1. **PRACTICE: Evidence: Probative Force for Jury.** It is the constitutional right of every litigant, when he has offered substantial evidence tending to prove his case, to have the probative force of his evidence determined by the jury; and, for the purpose of deciding whether there is substantial evidence to submit to the jury, his testimony should be taken as true and every reasonable inference therefrom in his favor should be made.

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2. **WITNESS: Waiver of Incompetency.** Where a party permits an incompetent witness to testify without objection and then cross-examines him in the hope of eliciting favorable testimony, he can not afterwards object to the witness as incompetent.

3. **———: Chattel Mortgage: Identification of Property.** One of several mortgagees in a chattel mortgage, given to secure the mortgagees as sureties on the mortgagor's note, is not a competent witness to identify the property mortgaged, after the death of the mortgagor, under section 4652, Revised Statutes 1899, although the mortgage provides that the property could be identified by him.

Appeal from Stoddard Circuit Court.—*Hon. J. L. Fort*, Judge.

REVERSED AND REMANDED.

Mozley & Wammack for plaintiff in error.

(1) "It is for the jury, and not for the court, to pass on the weight of evidence, where there is any evidence." This rule has no exceptions, and is as old as the jury system itself. Kelly v. Railroad, 70 Mo. 604; Cook v. Railroad, 63 Mo. 398; St. Vrain v. C. B. L. Co., 56 Mo. 590; Tutt v. Coloney, 62 Mo. 116; Holliday v. Jones, 59 Mo. 484; Richey v. Burns, 83 Mo. 364; Hite v. Railroad, 130 Mo. 140. (2) The court erred in not permitting witness, Lee Williams, to specifically identify the mortgaged property in his testimony. He was not within the rule of closing his mouth as a witness on account of the death of the other party to the mortgage. We are of opinion that under ordinary circumstances he could have identified the property without infringing upon the rule, but in the case at bar he was selected by the mortgagor (now deceased) for the specific purpose of identifying the mortgaged property; that selection was reduced to writing by D. K. Williams and acknowledged by him in compliance with all the legal formalities required in the execution of a mortgage. Moreover

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we contend that the identification of this property in a suit between the mortgagees and a third person charged with having wrongfully sold it, and to which the mortgagor was never a party, is an independent fact to which either of the mortgagees were competent to testify. Banking House v. Rood, 132 Mo. 256; Bates v. Forcht, 89 Mo. 127. (3) On cross-examination of witness R. L. Ladd, defendant elicited the following testimony with respect to declarations of D. K. Williams, viz: That D. K. Williams told him that the cattle and hogs shipped by defendant were the hogs and cattle described in the mortgage of 1896, given by him to plaintiffs. The witness had not testified as to these declarations in his direct examination; after testifying to them in Hume v. Hopkins, 140 Mo. 65; Hoen v. Strattman, 71 Mo. App. 402; Tomlinson v. Ellison, 104 Mo. 106.

C. L. Keaton for defendant in error.

(1) The description of the property in the petition —six head of cattle with their increase, and seventy-five head of hogs with their increase of the value of $1,250, and that described in the mortgage—"Six head of cattle (all my cattle) all of my hogs about seventy-five head (75)"—does not describe the same property, and is so vague and uncertain as to be ineffectual and void for uncertainty as to defendant. Plaintiffs did not and could not identify the property and the court did right to so declare to the jury in the instruction. Stonebreaker v. Ford, 81 Mo. 537; Chandler v. West, 37 Mo. App. 635 and cases and authorities cited; May v. Crawford, 150 Mo. 527 and cases cited; Carter v. Railway, 156 Mo. 642. (2) F. M. Ladd, R. L. Ladd and Lee Williams are incompetent witnesses for themselves claiming under the mortgage of D. K. Williams, who is dead. All our appellate courts have so decided. R. S. 1899, sec. 4654, proviso I; Meier v. Thieman, 90 Mo. 441; Saetelle v. Life Ins. Co., 81 Mo. App. 516 and cases

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cited; Miller v. Slupsky, 158 Mo. 646 and cases cited; Baker v. Reed, 162 Mo. 353. (3) The defendant had a right to cross-examine plaintiffs as witnesses to show the true source of their information and that it was based exclusively upon the conversations of D. K. Williams, the other party to the mortgage, who is dead, without waiving their incompetency and the court did right to take the whole case from the jury for want of competent evidence. Hollman v. Lange, 143 Mo. 106; Page v. Pankey, 6 Mo. 423; Walter v. Hoeffner, 51 Mo. App. 50-52; State v. Soper, 148 Mo. 235; Hite v. Street Railway, 130 Mo. 140.

BLAND, P. J.—In substance, the petition alleges that on the — day of March, 1899, plaintiffs were the owners of six head of cattle with their increase and seventy-five head of hogs with their increase, of the value of twelve hundred and fifty dollars; that afterwards, on the — day of March, 1899, the defendant wrongfully took possession of all said property and unlawfully converted it to her own use to plaintiffs' damage in the sum of twelve hundred and fifty dollars, for which they ask judgment.

The answer was a general denial.

At the close of all the evidence, the court instructed the jury that plaintiffs had entirely failed to identify the property claimed, and directed the jury to return a verdict for defendant. Plaintiffs preserved the evidence and their exceptions by bill of exceptions duly signed and filed, and brought the case to this court by writ of error.

The evidence shows that the plaintiffs, on August 6, 1896, became sureties on a note of D. K. Williams, payable to C. D. Matthews, for seven hundred dollars. To secure plaintiffs as such sureties, D. K. Williams executed, acknowledged and delivered to plaintiffs a chattel mortgage on a lot of personal property including all his cattle (six head) and all his hogs (about seventy-five

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head) situated on his farm adjoining the town of Dexter, in Stoddard county, Missouri, and named Lee Williams (one of the plaintiffs) and Anderson Williams, his son, as persons who could identify the property. The mortgage was duly recorded on August 10, 1896. Williams failed to pay the note at maturity and it was paid by the plaintiffs, his sureties, before the commencement of the suit. D. K. Williams died in November, 1900. The defendant is his widow. On March 6, 1899, defendant shipped a carload of hogs and a mixed car of hogs and cattle (about fifteen or sixteen cattle) from the Williams farm to Blakely-Sanders-Mann Company, National Stock Yards, Illinois. The shipment was received by the Blakely-Sanders-Mann Company and sold on the market as the property of defendant and a draft for the proceeds of the sale ($982.10) was drawn by Blakely-Sanders-Mann Company, payable to the defendant and remitted to her. She received and cashed the draft and used the proceeds in the purchase of a grocery store in Dexter in her own name, after the death of her husband. Plaintiffs claim that the hogs and cattle shipped on March 6, 1899, were the hogs and cattle and their increase embraced and described in the mortgage. To prove this contention Lee Williams, the brother of D. K. Williams and one of the parties named in the mortgage as a person who could identify the mortgaged property, testified that he knew the property, saw it every few days on his brother's farm up to and within one or two days before the shipment of March 6th; that about March 6th, it suddenly disappeared; that shortly thereafter the defendant told him she had shipped all the stock from the farm; that the cattle consisted of cows and that there were a number of brood sows among the hogs, and there was the usual increase from each from year to year after the mortgage was given.

R. S. Ladd testified that he knew the stock, saw it all along on D. K. Williams' farm after the mortgage was given; that it suddenly disappeared about the first

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of March, 1899; that he looked the matter up and after finding that defendant had made the shipment of March 6th, he had a conversation with her about the stock included in the mortgage and she told him she had shipped the stock and used the money in paying a debt she owed her mother. On his cross-examination the following occurred:

"Q. Then you don't know, and are not swearing that these hogs shipped on the 5th, 6th, 7th and 8th of March were the same hogs you saw on the farm—do you know? A. Mr. D. K. Williams told me they was.

"Q. Who? A. Mr. D. K. Williams.

"Q. But you don't know from your knowledge or observation? A. The best of my knowledge they were, because I saw the hogs on the farm, and when I came home, they told me the hogs were shipped—

"Q. I don't care about that; do you know? A. I went to the records and found the hogs were shipped in Mrs. Williams' name—I first went to the farm and Mr. Williams told me himself that she shipped them in her name—

"Q. What hogs—the hogs mortgaged? A. Yes, sir.

"Q. In whose presence? A. Me and D. K. Williams.

"Q. No one else? A. No, sir.

"Q. And Mr. Williams is dead? A. Yes, sir.

"Q. I was asking you, Mr. Ladd, if you know of your own knowledge that those hogs were the same hogs? A. That is all the knowledge I have of it.

"Q. That is all the knowledge you have of it? A. Yes, sir.

"Q. That is all. One further question: Did he, also tell you they were the same cattle he had in his mortgage? A. Yes, sir.

"Q. You are sure of that, are you? A. Yes, sir.

"Q. Did he tell you in what mortgage they were

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described? A. Yes, sir, we talked over the matter a number of times.

"Q. Did he tell you in what mortgage? A. Yes, sir.

"Q. Which one? A. The one made in 1896; they were only described in one mortgage.

"Q. That is all."

Re-direct examination.

"Q. (By Mr. Mozley): One other question now: When you went to the farm the second time after learning of the shipment, tell the jury if you found any of the stock covered by your mortgage, on the farm? A. No, sir, none at all.

"Q. Never seen them since? A. No, sir, he told me—

"Mr. Cramer: We object to what he told you.

"Q. I never asked him that. That is all.

"Mr. Cramer: If the court please, we move to exclude the statement made by D. K. Williams, as being incompetent testimony.

"The Court: Very well, the motion sustained; the testimony in reference to the declaration of D. K. Williams will be stricken out.

"Mr. Mozley: We except."

On the examination of Lee Williams the following occurred:

"Q. Now, Mr. Williams, I will ask you, if those cows and calves and hogs that you have spoken of to the jury are the cows and hogs—cattle and hogs and their increase described in the mortgage of 1896, and held by you and your coplaintiffs in this suit?

"Mr. Cramer: We object to that, if the court please, as being incompetent.

"The Court: Objection sustained.

"Mr. Mozley: We except. I offer to prove by Lee Williams that the property shipped by the defendant, Mrs. E. J. Williams, consisting of hogs and their increase, and cattle and their increase, is the property de-

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scribed in the mortgage executed by David K. Williams on the sixth of August, 1896, to the plaintiffs in this suit.

"Mr. Cramer: We object to it because it is incompetent; the witness being incompetent to testify, because D. K. Williams the other party to the mortgage is dead.

"The Court: You admit that D. K. Williams is dead.

"Mr. Mozley: Yes, sir; I think he is.

"The Court: Objection sustained.

"Mr. Mozley: We except."

1. On the part of the defendant, the evidence is strong that five of the cattle described in the mortgage died, or were accidentally killed in 1898, and that the other one was sold by D. K. Williams in the same year, and there was no living increase from any of these cattle on the farm when the shipment of March 6th was made; that all the hogs, except one or two old sows and a few shoats, with all their increase were sold by D. K. Williams in the year 1898; that the hogs and cattle shipped in March, 1899, were young hogs and cattle that had been purchased by D. K. Williams the year previous. It seems to us that the weight of the evidence greatly preponderates in defendant's favor, but the plaintiffs offered substantial evidence tending to prove their contention, that the cattle and hogs shipped on March 6th were the cattle and hogs and their increase described in the mortgage. Plaintiffs made a prima facie case and it is not within the province of this court nor was it within the province of the judge, who presided at the trial, to pass upon the probative force of the evidence and take it from the jury. The constitutional right of every litigant is, when he has offered any substantial evidence tending to prove his case or defense, that the probative force of his evidence shall be passed upon by the jury selected to try the issues. Richey v. Burnes, 83 Mo. l. c. 364, and cases cited; Wolff v. Campbell, 110 Mo. 114; Hirsch v. Lodge, 78 Mo. App. 358. And for

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the purpose of deciding whether or not plaintiffs' case should be submitted to the jury, plaintiffs' testimony should be taken as true and every reasonable inference therefrom in their favor should be made. Pauck v. St. Louis Beef & Provision Co., 159 Mo. 467; Duerst v. St. Louis Stamping Co., 163 Mo. 607; Steube v. Iron & Foundry Co., 85 Mo. App. 640.

2. If it be conceded that Ladd was not a competent witness the defendant waived the incompetency by not making a timely objection to his testimony. The objection made was not until the defendant had drawn from the witness, on his cross-examination, evidence that she was not expecting and that was prejudicial to her interest. A party can not take the chance of waiving the incompetency of a witness in the expectation of drawing from him favorable testimony for himself and when the experiment proves disastrous, withdraw his waiver and have the evidence he himself had drawn out stricken out of the record. Banking House v. Rood, 132 Mo. 256; Tomlinson v. Ellison, 104 Mo. 105; Hume v. Hopkins, 140 Mo. 65; Hoehn v. Struttman, 71 Mo. App. l. c. 402; And the court erred in striking out that part of Ladd's testimony copied in the statement of facts.

3. Was Lee Williams a competent witness to testify to the facts (identification of the property) that plaintiff offered to prove by him? He was one of the mortgagees, a party plaintiff and interested in the event of the suit, and the matter in controversy arose out of the mortgage, it was concerning the mortgaged property. The mortgagor, D. K. Williams, was dead. The mortgagees were therefore disqualified to testify to any fact concerning the mortgage or its contents. Section 4652, R. S. 1899. But it is contended that the following clause in the mortgage, to-wit, "and (the property) can be identified by Lee Williams and Anderson Williams (my son)." The most that can be said of this clause is that the mortgagor said to the mortgagees, "I have not given you a full and minute description of the prop-

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erty I have mortgaged to you and you may not be able to identify it, if not, here is Lee Williams, my brother, and Anderson Williams, my son, they know the property and can identify it for you and I will stand by their identification." In other words, D. K. Williams constituted Lee Williams one of his agents to identify the property if the mortgagees should ask for it. In these circumstances, Lee Williams would be a competent witness but for his interest. Stanton v. Ryan, 41 Mo. 510; Clark v. Thias, 173 Mo. 628; Dawson v. Wombles, St. Louis Court of Appeals (not yet reported). His interest, however, disqualified him to testify at all to any facts concerning the mortgage or the property described therein. Section 4652, supra.

A mass of testimony was admitted concerning a chattel mortgage executed on March 7, 1899, by A. Booher to D. K. Williams, and its assignment to these plaintiffs as collateral to secure them as sureties of D. K. Williams on a twenty-seven-hundred-dollar note given by Williams to Matthews. This mortgage and the proceedings taken on it were in no way connected with the matter in controversy and the mortgage and all the evidence in respect to it should be excluded on a retrial of the case.

For errors herein noted the judgment is reversed and the cause remanded. *Reyburn* and *Goode, JJ.*, concur.

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STATE OF MISSOURI, Respondent, v. GILLESPIE, Jr., Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **CRIMINAL LAW: Dramshops: Keeping Open on Sunday: License.** In a prosecution against one for keeping a dramshop open on Sunday, it was not necessary for the State to show that the defendant had a license as a dramshop keeper.

2. ———: ———: ———. Where a witness for the State testified that he entered a back room of the defendant's saloon on Sunday, with a companion, that the companion went into the front room and returned in a few minutes with a bottle of whiskey, that he saw, through the opening in the partition, several men standing in front of the bar, but did not see them drinking, that he saw a man standing behind the bar, whom he took to be the defendant, this was sufficient evidence to support a verdict of guilty.

3. ———: ———: ———: **Misconduct of Counsel.** Where the prosecuting attorney, in his closing argument, used the following language: "They can afford to pay a fifty dollar fine and then go ahead and sell liquor on Sunday, as they will do," and the court refused to reprimand him, it was error and justified a remanding of the case for a new trial.

Appeal from Greene Criminal Court.—*Hon. J. J. Gideon,* Judge.

REVERSED AND REMANDED.

Hamlin & Mason for appellant.

State ex rel. v. Scott, 96 Mo. App. 620; State v. Ferguson, 152 Mo. 92; State v. Punshon, 133 Mo. 44; State v. Warford, 106 Mo. 55; State v. Riley, 4 Mo. App. 392.

BLAND, P. J.—Coleman C. Nee and Patrick H. Gillespie, Jr., were, at the July Term, 1902, of the Greene county criminal court, indicted by the

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grand jury for keeping open their dramshop, in the city of Springfield, on the first day of the week, commonly called Sunday. Nee was acquitted but Gillespie was convicted; from his conviction he has appealed to this court. At the close of the State's evidence he asked a peremptory instruction directing the jury to acquit him. The refusal of this instruction is assigned as error.

The evidence for both the State and the defendants shows that Nee and Gillespie kept a dramshop in the city of Springfield. To prove this fact the State was not required, as contended by appellant, in this proceeding to show that they had a license as dramshop keepers, all that was essential to a conviction was to show that they kept a dramshop and kept it open on some Sunday within one year next before the filing of the indictment. To show the fact of keeping open their dramshop on Sunday, the State offered but one witness, M. V. Massey. He testified, in substance, that the building in which the dramshop was kept was seventy-five or eighty feet long; that there was a partition in the building cutting it into two rooms, with an opening in the partition of about six feet; in the front room was the bar. The back room was used as a wareroom. There was an alley back of this building and near the alley in the side of the building was a door which afforded an entrance into the wareroom; that he and one O'Bannion, on a Sunday within the year next before the filing of the indictment, entered the wareroom through this side door; that he halted in the back room but O'Bannion went through the opening into the front room to the bar and returned in a few minutes; that he and O'Bannion then went into the alley and O'Bannion had a bottle of whiskey in his pocket or under his coat, and that each took a drink from the bottle. He further testified that he saw through the opening in the partition, several men standing in front of the bar but did not see them drink-

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ing anything and that a man was standing behind the bar whom he took to be and thought was Gillespie. Defendant's own evidence shows that he was at the saloon on the Sunday testified to by Massey, but was there for the purpose of having the saloon cleaned up and not for the purpose of keeping it open and selling liquor, and that he did not sell any liquor on that day. We think the evidence was sufficient to warrant the jury to come to the conclusion that defendant did have the saloon open on the day testified to by Massey and did then and there sell liquor.

The prosecuting attorney, in his closing argument, used the following language: "They can afford to pay a fifty dollar fine and then go ahead and sell liquor on Sunday, as they will do." The attorneys for the defendants objected to said language, and asked the court to reprimand the prosecuting attorney, at the time, and instruct the jury that they should not consider said statement. Which request the court refused to comply with. This language was highly improper, coming from the prosecuting attorney in making his closing argument to the jury. It was his duty to protect as well as prosecute the defendant. The language amounted to an open charge from an officer whose duty it is to ferret out crime, that the defendants were in the habit of keeping open their saloon on Sundays. This language was necessarily prejudicial. The keeping of a saloon is not to be commended, but a saloon keeper is as much entitled to a fair and impartial trial when prosecuted for an alleged violation of the dramshhop act as is the citizen occupying the most exalted position when prosecuted for an alleged misdemeanor.

The judgment is reversed and the cause remanded. *Reyburn* and *Goode JJ.*, concur.

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FIRST STATE BANK OF CORWITH, IOWA, Appellant, v. HAMMOND, Respondent.

St. Louis Court of Appeals, February 16, 1904.

1. **EVIDENCE: Peremptory Instruction.** The evidence in the case is examined and it is held that a peremptory instruction to find for plaintiff was properly refused.

2. ———: **Defense of Fraud: Burden of Proof Shifted.** In an action on promissory notes by the indorsee, where the answer alleged that they were procured by fraudulent representations and without consideration, after defendant proved the fraud, the burden was then shifted to plaintiff to show by a preponderance of the evidence that it was a bona fide holder for value.

3. ———: ———: **Notice of Fraud.** Notice to the indorsee of a negotiable instrument purchased before maturity, of fraud in its procurement, which would defeat his action against the maker, must be actual knowledge of the fraud; mere knowledge of facts which would put a prudent man upon inquiry is not sufficient.

Appeal from Howell Circuit Court.—*Hon. W. N. Evans*, Judge.

REVERSED AND REMANDED.

James Orchard and *C. R. Wood* for appellant.

(1) The question is: Was plaintiff an innocent purchaser for value before maturity, without notice of any fraud in the inception of the contract, and if so, then it is entitled to recover. First National Bank of Springfield v. Skeen, 101 Mo. 683; Jennings v. Todd, 118 Mo. 296. (2) The consideration of negotiable paper in the hands of a bona fide holder for value before maturity can not be inquired into; *mala fides* alone can open the door to such inquiry. Gross negligence is not sufficient, but actual notice of the facts which impeach

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the validity of the note must be brought home to the holder. Mayes v. Robinson, 93 Mo. 114. There is no evidence to support the verdict in this case and the court should have given instruction numbered one, offered by plaintiff, by way of peremptory instruction, directing the jury to return a verdict for the plaintiff. (3) The court erred in giving instructions numbered 1, 2, and 3. Said instructions put the burden on plaintiff to prove it was a bona fide and innocent purchaser, when in fact it devolved on defendant to show that notice of the fraud and want of consideration, and especially of the want of consideration, and is a violation of all the rules laid down by the appellate courts of this State and should not have been given, for if plaintiff is an innocent purchaser before maturity, there can be no inquiry into the consideration as between the original parties. Merrick v. Phillips, 58 Mo. 436. (4) If a party shows that he acquired negotiable paper in good faith, actual notice of facts impeaching its validity must be brought home to him to affect his rights. Central National Bank v. Pipkin, 66 Mo. App. 592. And it is immaterial though the purchaser's negligence be gross. Hamilton v. Marks, 63 Mo. 167. (5) The rule that a purchaser of negotiable paper is not an innocent holder if there are circumstances connected with the transfer sufficient to put an ordinary, prudent man on inquiry, is uncertain, void of uniformity and will not be adhered to in this State. (6) The consideration of a negotiable note can not be inquired into when the same is held by an innocent purchaser until it is shown that the holder is not an innocent purchaser and had actual knowledge of the failure of consideration. Horton v. Bayne, 52 Mo. 531. (7) An indorsee of negotiable paper before maturity is presumed to be the owner in good faith and for value, in the absence of evidence to the contrary. Corbey v. Butler, 55 Mo. 398.

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Green & Clark for respondent.

(1) The refusal by the court to give appellant's peremptory instruction was not error. Bank v. Hainline, 67 Mo. App. 483; Brewer v. Lindsay, 72 Mo. App. 591; Mosby et al. v. Commission Co., 91 Mo. App. 500; Rice v. McFarland, 41 Mo. App. 489; Ganz v. Weisenberger, 66 Mo. App. 110; McAfee v. Ryan, 11 Mo. 365; Memphis v. Matthews, 28 Mo. 248; Morgan v. Durfee, 69 Mo. 476; Powell v. Railroad, 76 Mo. 80. (2) Where there is any evidence, however slight it may be, and whether direct or inferential, it may go to the jury, who are the exclusive judges of its weight and sufficiency, and in such case instructions in the nature of a demurrer to the evidence are properly refused. Dunbar v. Fifield, 85 Mo. App. 484; Taylor v. Short, 38 Mo. App. 21; Grant v. Railroad, 25 Mo. App. 227; Matthews v. Railroad, 26 Mo. App. 75; Charles v. Patch, 87 Mo. 450; Twohy v. Fruin, 96 Mo. 104; Bank v. Bank, 151 Mo. 320. (3) It was not necessary for respondent to bring home to appellant knowledge of specific facts that would impeach the validity of the notes in question. Evidence that the holder was aware of facts from which an inference of knowledge of a valid defense to the notes arises has been deemed sufficient for that purpose. Whaley v. Neill, 44 Mo. App. 320; Studebaker Mfg. Co. v. Dickson, 70 Mo. 272; Wright Investment Co. v. Tillingham, 85 Mo. App. 534. (4) Instructions numbered 1, 2, and 3, given on part of respondent, correctly declared the law. When the maker of a note introduces evidence tending to show that the note was procured by fraud, the burden then devolves upon the holder to show that he is a bona fide holder for value without notice. Hahn v. Bradley, 92 Mo. App. 399; Hamlin v. Marks, 63 Mo. 167; Daniel Neg. Inst. (4 Ed.), secs. 814, 815.

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BLAND, P. J.—On January 21, 1901, defendant executed and delivered to the Corwith Nursery Company, of Corwith, Iowa, his two negotiable promissory notes for five hundred dollars each, payable one year after date. Plaintiff claimed to have purchased these notes of the Corwith Nursery Company, February 1, 1901. As the legal holder of the notes, plaintiff brought this suit thereon against the defendant in the Howell circuit court.

The answer of the defendant alleged that the notes were procured by false and fraudulent representations and that the consideration for them had wholly failed.

After proving the indorsement and transfer of the notes to it on February 1, 1901, plaintiff offered them with the indorsements in evidence. Defendant offered evidence tending to prove that the notes were obtained by false and fraudulent representations made to him by Uecke, secretary and manager of the Corwith Nursery Company, and that the consideration for which the notes were given had wholly failed. Defendant testified that about February 27, 1901, he wrote to plaintiff asking for information as to the standing of the nursery company; that he thereafter received the following reply written at the bottom of his letter: "We do not have their account and can not say how they are. Respt., J. H. Standring, Chr. 3-1-1901." J. H. Standring testified that he was cashier of the plaintiff bank; that he as such cashier bought the notes of the nursery company about February 1, 1901, paying one thousand dollars in cash for them; that the purchase was made in good faith without knowledge of any fraud or failure of consideration of the notes, that the nursery company had ceased to do business. It appears from the testimony that the defendant, at the time he gave the notes and thereafter, was a resident of Howell county.

Plaintiff moved for a peremptory instruction to the jury to find for it which the court refused.

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The court gave the following instructions for the plaintiff:

"2. The court instructs the jury that the plaintiff sues on two promissory notes for five hundred dollars each, executed by the defendant to the Corwith Nursery Company, on the twenty-first day of January, 1901, each payable one year after date, bearing interest from date at the rate of eight per cent per annum; that the plaintiff, the First State Bank of Corwith, Iowa, claims to have bought said notes for value, before maturity, in good faith, without knowledge of any fraud or false representation made by the nursery company to the defendant; that defendant admits the execution of said notes, but claims that said notes were executed by false and fraudulent representations, and that he was induced to sign the same by said false and fraudulent representations by the Corwith Nursery Co. and he claims that plaintiff had full knowledge of said false and fraudulent representations and that the plaintiff, the First State Bank of Corwith, Iowa, denies said charges and says it was a purchaser for value, before maturity, in good faith, without knowledge of any fraud. The jury is, therefore, instructed that if you find from the evidence that the plaintiff purchased said notes before maturity, in good faith and for a valuable consideration, without any knowledge of the false and fraudulent representations on the part of the Corwith Nursery Company, then you will find the issues for the plaintiff on each count of said petition and for the sum of five hundred dollars with interest at eight per cent from the date of said notes to the present time.

"3. The court instructs the jury that, although you may believe that the Corwith Nursery Company obtained the notes in question by false and fraudulent representations, still you should find for the plaintiff if you believe it bought such notes before maturity, for a valuable consideration and in good faith, without any

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knowledge of such fraud on the part of the Corwith Nursery Company.

"4. Although you may believe there was a failure of consideration of the notes in question, you must still find for the plaintiff if you believe it bought such notes and the Corwith Nursery Company assigned them to it for value before plaintiff had knowledge of such failure of consideration; and it devolved upon the defendant to establish the failure of consideration and knowledge thereof on the part of the plaintiff before or at the time of such purchase by the greater weight of evidence."

The following instructions were given for defendant:

"1. The court instructs the jury that if you should find from the evidence that the notes sued on were without consideration and that they were obtained by fraud and misrepresentations as alleged by defendant, then and in such event, before the plaintiff would be entitled to recover, it must show by the greater weight of the evidence: 1. That it is the bona fide owner of such notes. 2. That it purchased said notes for value before maturity. 3. That it had no knowledge of said fraud and want of consideration.

"2. The court instructs the jury that in determining as to whether or not plaintiff is the bona fide owner of the notes sued on, and that it purchased said notes for value before maturity of same, you should take into consideration all the facts and circumstances attending the claimed purchase of said notes by the plaintiff.

"3. Although you may believe plaintiff did not have actual notice that the notes sued on were without consideration or obtained by fraud and misrepresentations, if they are without consideration, or obtained by fraud or false representations, yet the court instructs that plaintiff would be charged with notice if it knew of such facts as would lead an ordinary, prudent man to

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suspect that such notes were without consideration or obtained by fraud or misrepresentation.''

The verdict was for the defendant. After a timely but unavailing motion for new trial plaintiff appealed.

1. Appellant insists that its peremptory instruction should have been given. There is no direct evidence that plaintiff had knowledge of the infirmities of the note. The evidence of the cashier is that it did not have, but that the bank bought the notes in good faith and without any knowledge that they had been obtained by fraud or that the consideration had failed. The jury, however, may not have believed the witnesses. It is not shown that the bank had any knowledge or information of the financial ability of the defendant to pay the notes, or that its officers made any inquiry as to his financial standing before they made the purchase. It is also shown in evidence that though the bank and the nursery company were located in the same town and the bank dealt with the nursery company and must have had knowledge of its financial standing, on March 1, 1901, its witness wrote the plaintiff it could not say how the nursery company stood. The evidence further tends to show that when the nursery company took the notes, it was in a bad shape and it thereafter went out of business, presumably for the reason it was financially unable to continue in business. Banks are not in the habit of buying commercial paper and paying value therefor or anything of value at all, in such circumstances, and the jury might very justly infer that the bank did not pay value for the notes. For these reasons we conclude that the peremptory instruction to find for the plaintiff was properly refused.

2. The first instruction given for defendant is correct on the showing made by the defendant that the notes were procured by fraud; on this showing the burden was shifted to the plaintiff to show by the preponderance of the evidence that it was a bona fide holder of the notes for value. Hahn v. Bradley, 92 Mo. App. 399.

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The third instruction given for defendant is erroneous. Knowledge of facts which would put a prudent man on inquiry is not sufficient to affect the title of an indorsee of a negotiable instrument purchased before maturity. Nothing short of actual knowledge or bad faith will defeat his title. Hamilton v. Marks, 62 Mo. 167; Mayes v. Robinson, 93 Mo. 114; Jennings v. Todd, 118 Mo. 296; Bank v. Skeen, 29 Mo. App. 115; Id., 101 Mo. 683. For error in giving the third instruction for defendant the judgment is reversed and the cause remanded. *Reyburn* and *Goode, JJ.*, concur.

CUNNINGHAM, Respondent, v. DICKERSON, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **Justices of the Peace: Statement of Complaint.** Where all the facts essential to a recovery are to be gathered from the complaint, it is a sufficient statement of a cause of action, in a suit brought before a justice of the peace.

2. **Measure of Damages: Overdriving Horses.** In an action for damages caused by overdriving a team let to the defendant for hire, where the injuries to the team are permanent, the proper measure of damages is the difference between the value of the team immediately before and immediately after the injury, and the reasonable expenses incurred and value of time spent in endeavoring to effect a cure.

Appeal from Texas Circuit Court.—*Hon. L. B. Woodside,* Judge.

AFFIRMED.

Govert & Govert and *G. A. Watson* for appellant.

The petition states no cause of action in that it does not allege that plaintiff was the owner of the team alleged to have been damaged. We think this allegation

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an essential one even under the loose pleadings permissible in a justice's court. The supreme court lays down the rule that in cases like this, the measure of damage is the expense incurred by plaintiff in curing the horse of his injuries; the loss of time of said horse whilst so injured and the difference, if any, in the value of the horse now by reason of the injury, and the value of the horse before the injury. Street v. Laumier, 34 Mo. 469; Shaw v. M. and K. Dairy Co., 57 Mo. App. 521.

Lamar, Barton & Lamar for respondent.

(1) The petition is in an approved form. Kelley's New Treatise (Ed. 1890), sec. 67, form 12. And is sufficient under numerous rulings of our court. Johnson v. Moffett, 19 Mo. App. 159; Strathman v. Gorla, 14 Mo. App. 1; Allan v. McMonagle, 77 Mo. 478. Even if the case had originated in the circuit court, defendant can not now complain because he went to trial, the evidence as to ownership is undisputed and was admitted without objection. The complaint could have been amended in the court below and will be treated as amended here. Sawyer v. Railroad, 156 Mo. 477. (2) The instruction complained of correctly declares the measure of damages. Dietrich v. Railroad, 89 Mo. App. 36; Hoffman v. Railroad, 51 Mo. App. 279.

BLAND, P. J.—The suit was begun before a justice of the peace where the following complaint was filed:

"Plaintiff for cause of action states that on the thirteenth day of May, 1901, he let to the defendant a certain team of horses, for hire, and that defendant, contrary to his duty, drove the horses immoderately and kept them negligently, whereby said horses became sick and permanently diseased. That plaintiff has wholly lost the services of said horses, from the said thirteenth day of May, 1901, to the present time; that plaintiff has

expended in doctoring said horses the sum of five dollars; wherefore plaintiff has sustained damages in the sum of fifty dollars."

The cause was taken by appeal to the circuit court of Texas county where on a trial *de novo,* plaintiff recovered a judgment for forty-five dollars. Defendant duly appealed to this court.

For a reversal of the judgment, appellant assigns two errors. First, that the complaint filed before the justice, and on which the cause was tried in the circuit court, fails to state any cause of action. Second, that the court erroneously instructed the jury as to the measure of damages. The defendant was notified by the complaint that plaintiff claimed that on May 13, 1901, he let the defendant a team of horses; that defendant negligently overdrove said team of horses and permanently injured them; that plaintiff had paid out five dollars for doctoring the horses, and that he demanded judgment for fifty dollars for permanent damage to the horses, and his expense in doctoring them. All the facts essential to a recovery are to be gathered from the complaint, and the defendant was fully notified by the complaint of these facts. Under all the authorities this was sufficient to constitute a good complaint in a suit brought before a justice of the peace. Allen v. McMonagle, 77 Mo. 478; Strathmann v. Gorla, 14 Mo. App. 1; Johnson v. Moffett, 19 Mo. App. 159.

The instruction complained of is as follows:

"The court instructs the jury that if you believe and find from the evidence, that the plaintiff was the owner of and hired the team of horses, stated in complaint, to the defendant to drive from Cabool to Houstion, Missouri, and that the defendant drove said team unreasonably fast and by such unreasonable driving of said horses permanently injured the same, you will find the issues for the plaintiff and assess his damages at such sum as you may find from the evidence said horses were damaged by such unreasonable driving

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not to exceed forty-five dollars. If you find the plaintiff is entitled to recover, under the above instructions, the measure of damages would be the difference in the value of said team immediately before and immediately after such driving, provided such difference was caused by such unreasonable driving by the defendant, not to exceed the sum of forty-five dollars."

The evidence in the case is overwhelming and not substantially denied by the defendant, that he, not negligently, but recklessly, overdrove plaintiff's horses. In respect to the injury resulting from the abuse of the team, the evidence tends to show that the horses were thereafter stiff and unfit for use for more than three weeks and that their legs were swollen and continued to swell from time to time long afterwards and until plaintiff parted with them; that they were worth sixty dollars less when returned by defendant than when let to him. There was no evidence as to the value of the services of the horses for the three weeks they were totally unfit for use, and no evidence that plaintiff paid five dollars or any other sum for doctoring the horses. When property is not entirely lost or destroyed but only impaired in value, the measure of damages is the difference between the value before the injury and immediately thereafter and the reasonable expense incurred or value of time spent in reasonable endeavor to preserve or restore the property injured. 1 Field on Damages, p. 621; Dietrich v. Railway, 89 Mo. App. 36; Hoffman v. Railway, 51 Mo. App. 273. In Streett v. Laumier, 34 Mo. 469, it was ruled that the measure of damage in this character of case "will be the expenses of curing the horse of his injuries, the value of his services while being cured, and the difference between the value of the horse before the injury and after the cure." This case is approvingly cited in Shaw v. Dairy Co., 56 Mo. App. l. c. 525. When a cure has been effected the correct rule as to the measure of damages is the one stated in Streett v. Laumier, supra. But where the injury is permanent

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it seems to us the correct rule is as stated by Field in his work on damages and approved in the Dietrich case. Harrison v. Railway, 88 Mo. 625.

The instruction complained of is in accord with this rule and we think was proper under the evidence in the case.

The judgment is manifestly for the right party and is affirmed. *Reyburn* and *Goode, JJ.*, concur.

COOPER, Respondent, v. SCYOC, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **ABUSE OF JUDICIAL PROCESS: Garnishing Exempt Wages.** An action for abuse of judicial process will lie against an execution creditor who wrongfully, maliciously and without probable cause, repeatedly garnishes the exempt wages of his debtor.

2. **EVIDENCE: Return of Officer: Garnishment.** The return of the constable, indorsed on the notice of garnishment which was served on the garnishee, is original evidence of the fact of service, and it is unnecessary to show an indorsement of the fact on the execution.

3. **ABUSE OF JUDICIAL PROCESS: Garnishing Exempt Wages: Claiming Exemption: Instruction.** In an action for abuse of judicial process in garnishing plaintiff's exempt wages, an instruction which told the jury that plaintiff was the head of a family, and his employer was not chargeable as garnishee on account of wages due him for the last thirty days' service, and defendant had no right to summon the garnishee on account of such wages, properly declared the law, there being no evidence that plaintiff had waived his right to claim his exemptions.

4. ———: ———: **Exemplary Damages.** Such an action is one in which exemplary damages may be allowed in the discretion of the jury where the abuse of process was malicious.

5. ———: ———: **Loss of Time: Remote Cause.** But plaintiff can not recover damages for loss of time by reason of being discharged by his employer and thrown out of employment, on account of the repeated garnishments; the cause of the discharge is too remote.

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6. ——: ——: **Creditor and Officer Jointly and Severally Liable.** The officer who serves the writ and the execution creditor who directs his action, are jointly and severally liable for abuse of the process of garnishment.

Appeal from Hannibal Court of Common Pleas.—*Hon. David H. Eby,* Judge.

AFFIRMED.

E. W. Nelson and *Roy & Hays* for appellant.

(1) There is no cause of action stated in the petition. The defendant had the right to order constable to garnish the railroad company. It was not for execution creditor to determine debtor's right to exemption. It is for the debtor to say whether he will waive the right or insist upon it. Osborne v. Schutt, 67 Mo. 712; State v. Koch, 47 Mo. App. 269. (2) The protection of the debtor is cast upon the constable, who is bound to notify the debtor of his right to make his selection and claim, and the justice has no jurisdiction to try the question of exemption, but the exemptions must be allowed by the constable or sheriff. State ex rel. v. Barrada, 57 Mo. 562; State ex rel. v. Barnett, 96 Mo. 133. (3) And this is true in case of garnishment of wages. Howland v. Railroad, 134 Mo. 474. (4) Before summoning the garnishee the constable must notify execution debtor of his rights to exemption. State ex rel. v. O'Neil, 78 Mo. App. 25; State use of Maher v. Sontag, 15 Mo. App. 312; Revised Statutes, sec. 3163; Whitten v. Bennett, 30 C. C. A.; Jeffery v. Robbins, 73 Ill. App. 353; Bonney v. Kins, 103 Ill. App. 601. (5) The court should have instructed a verdict for defendant. There is no proof of any garnishment. The only way in which the garnishment can be proved is by the return of the constable on the writ of execution. And the executions in evidence had no return except that of *nulla bona,* and the so-called returns on the summonses

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to the garnishee did not refer in any way to the execution, nor did the summonses themselves, and they did not constitute a sufficient return to show garnishment. Hackett v. Gihl, 63 Mo. App. 453; Dunn v. Railway, 45 Mo. App. 29; Grocer Co. v. Carlson, 67 Mo. App. 179; Marshall v. Schricker, 63 Mo. 309. (6) Instructions Nos. 7 and 8 are contradictory of themselves and are misleading on the subject of punitive damages. They tell the jury that in case they find for the plaintiff they should allow, first, actual damages, and second, in addition thereto may allow punitive damages. By the plainest rules of construction the word should applies to both kinds of damages. This would naturally leave the jury in doubt as to whether the should or might find punitive damages, was an error. Legg v. Johnson, 23 Mo. App. 590; Staples v. Town of Canton, 69 Mo. 592. (7) The instruction should have been so drawn as to leave to the jury the free exercise of their discretion as to the allowance of exemplary damages. Nicholson v. Rogers, 129 Mo. 136; Carson v. Smith, 133 Mo. 617.

F. L. Schofield and *G. W. Whitecotton* for respondent.

(1) A perfect cause of action is stated in the petition. It is abundantly supported by both reason and precedent. It avers wrongful acts done or procured to be done by defendant, willfully and without just cause, with malice express, and resulting in injury and damage. In such case it were a reproach to any system of remedial jurisprudence if it afforded no redress. But analogies and precedents for the exact case are not wanting. Nix v. Goodhill, 95 Iowa 282; s. c., 58 Am. St. 434. A cause of action arises where a person maliciously procures the discharge of another regardless of means used. 1 Joyce on Damages, 509. (2) An action has always been held to lie against an officer for seizing property which he knew to be exempt from execution.

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Freeman on Executions, secs. 211-215; Tynd v. Pickett, 7 Minn. 184; Cronfeldt v. Arrol, 50 Minn. 327; Coleman v. Ryan, 58 Ga. 132; Harrington v. Smith, 14 Colo. 378. (3) And the execution creditor is equally liable with the officer if he directs the levy, and he is a co-trespasser and is either jointly or separately liable. 12 Am. and Eng. Ency. Law (2 Ed.), 250; Atkinson v. Golcher, 23 Ark. 101; Spencer v. Brighton, 49 Me. 326; Bonnell v. Dunn, 29 N. J. L. 435; Matthew v. Redwine, 25 Miss. 99. (4) Even in cases of malicious attachment it is not necessary that the defendant should have participated in the execution of the attachment process. Responsibility attaches to him by making the affidavit maliciously, whereby the machinery which accomplished the wrong was set in motion. Walser v. Thies, 56 Mo. 89. And the execution creditor is liable even where the debtor has failed to claim his exemption, if he had previously claimed the property as exempt from a former seizure on the same judgment. Haswell v. Parsons, 15 Cal. 266.

STATEMENT.

On June 15, 1899, defendant herein recovered a judgment of fourteen dollars and twenty cents debt, and ten dollars and eighty cents costs against plaintiff herein, before D. S. Scott, a justice of the peace of Mason township, in Marion county, Missouri. On the same day an execution, returnable in ninety days, was issued on said judgment and delivered to the constable of Mason township. The execution was served on Cooper, the defendant therein, but was not satisfied, and was renewed by the justice of the peace on September 13, 1899, again on December 12, 1899, again on March 12, 1900, and on June 14, 1900, was returned wholly unsatisfied, no goods or chattels of defendant having been found whereon to levy the same. On the fourth

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day of December, 1900 by order of Scyoc, an alias execution returnable in ninety days was issued on the judgment, and delivered to the constable of Mason township. This alias execution was renewed every ninety days thereafter down to the day of the filing of the petition herein (February 24, 1902), and was in the hands of the constable when this suit was commenced. The suit is to recover actual and punitive damages for alleged malicious abuse of judicial process issued and renewed on the judgment of June 15, 1899, and is in two counts. The first count is for alleged malicious abuse of process by the steps that were taken by the constable and the plaintiff on the first execution and the several renewals thereof. The second count is for malicious abuse of the process under the alias execution and the several renewals thereof.

The answer was a general denial.

The evidence is that Cooper, the plaintiff, was a mechanic and was, when the judgment before the justice of the peace was rendered, in the employ of the Hannibal & St. Joseph Railroad Company (lately taken in by the Burlington Railroad Company) and worked in the shops of said company at Hannibal, Missouri, and continued to work therein until he was subsequently discharged by the Burlington Railroad Company. The average of his wages was about fifty-two dollars per month. He had a wife and four children, and a dwelling house, in which he lived with his family, mortgaged for all it was worth. He was possessed of considerable less than three hundred dollars in personal property, and depended solely upon his wages for the support of himself and family. Under the rules of the railroad company its employees were paid from the eleventh to the sixteenth of each month for the prior month's earnings, so that the railroad company, after the first month's employment, retained in its possession or kept back two weeks' wages of its employees. This rule was observed in making payments to Cooper while he was in the em-

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ploy of the companies. When the constable served the original execution on Cooper, he claimed his right of exemption and furnished the constable with a sworn schedule of his property and the value thereof, showing that it was worth considerably less than three hundred dollars. By direction of Scyoc, the constable garnished the railroad company. The fact of the service of garnishment was not at any time indorsed on the execution and for this reason defendant objected to any evidence tending to show that the railroad company had been garnished. This objection was overruled by the court, to which ruling the defendant objected and excepted. That this matter may be fully understood, we will set out in full what was done under the defendant's orders to the constable to garnish the railroad company. The following notice or summons of garnishment was first read in evidence:

"D. R. Scyoc, plaintiff, v. C. F. Cooper, defendant.

"Attachment before D. S. Scott, justice of the peace, Mason township, Marion county, Missouri.

"To the Hannibal & St. Joseph Railroad Co., garnishee:

"You are notified that I attach, in your hands, as the property and effects of said C. F. Cooper, the defendant in the above entitled cause, all the debts due from you to the said defendant, or so much thereof as shall be sufficient to satisfy the debts and interest or damages and costs in the above entitled action. And also that I do attach in your hands, all goods and chattels, money or evidence of debt, belonging to and being the property of said defendant, C. F. Cooper.

"And to be and appear before D. S. Scott, a justice of the peace within and for the township of Mason, in the county of Marion, at his office in said township, on the eighteenth day of July, 1899, at seven o'clock, a. m., then and there to answer such interrogatories as may be put to you by said justice.

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"This tenth day of July, 1899.

(Signed) "F. K. GREEN,

"Constable of Mason township."

On the back of this notice or summons was indorsed the following return, also read in evidence:

"I hereby certify that I delivered a true copy of the within summons to H. M. Kerr, the general agent of the H. & St. J. R. R. Co., at Hannibal, on the tenth day of July, 1899, in the city of Hannibal, county of Marion, and State of Missouri.

"F. K. GREEN,

"Constable."

The garnishee appeared before the justice and made the following answer which was offered in evidence:

"D. R. Scyoc, plaintiff, v. The Hannibal & St. Joe R. R. Co., garnishee of C. F. Cooper, defendant.

"Now comes the above named railroad company, garnishee herein, and for its answer states:

"1st. That at the time of the service of the garnishment upon it herein it did not have, has not since had, nor has it now, in its possession or under its control any property, money or effects of the said defendant except as herein stated.

"2d. That at the time of the service of the garnishment upon it herein it did not owe the said defendant any money nor does it owe him any money now except as herein stated.

"3d. That this garnishee owes and is indebted to the aforesaid defendant in the total sum of thirty-six dollars and forty cents ($36.40) which said sum of wages earned by said defendant while in its employ and is now due and unpaid.

"4th. That of the aforesaid amount of money so due and owing to defendant all thereof, to-wit, the sum of thirty-six dollars and forty cents is due from this garnishee to defendant as and on account of wages earned by the defendant for and during the last thirty

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days service in the employ of this garnishee. That said employee (the defendant herein) is the head of a family and a resident of the State of Missouri, and that therefore by virtue of the provisions of section No. 5220, of the Revised Statutes of Missouri, 1889, this garnishee is not in the cause chargeable as garnishee on account of said sum of wages so due from it to the defendant for the last thirty days' service of defendant in its employ.

"Wherefore, having fully answered, garnishee asks to be discharged with its costs and to be allowed a reasonable fee for this answer, as provided by sec. 5238, R. S. 1889.

"HANNIBAL & ST. JOSEPH RAILROAD COMPANY,
"By SPENCER & MOSSMAN, its General Solicitors.
"Filed, July 18, 1899.
"D. S. SCOTT, Justice of the Peace."

The evidence of Scyoc is that he gave the constable a standing or running order to continue summoning the defendant as garnishee. Under these instructions, on each execution and on each renewal of the original execution, and on each renewal of the alias execution, a like notice or summons of garnishment was served on the railroad company, a like return was made thereon, and a like answer was filed by the garnishee as on the original execution.

The docket entries of the justice show a dismissal of the garnishment by the constable, on August 10, 1899, and on August 21, 1899, that Cooper gave notice and claimed his statutory rights to his wages as exempt from execution or garnishment. On September 12th, the docket shows a release of the garnishment by the constable. It further shows that on March 19, 1899, Cooper again claimed his exemption rights and the garnishee was released by Scyoc. The docket shows that on April 12, 1900, December 9, 1901, January 10, 1902, and February 11, 1902, garnishments were dismissed by

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order of the plaintiff and in each instance a re-summons was ordered to be issued and served on the railroad company as garnishee. The total cost of the several garnishments was $39.65.

Cooper testified that he paid his attorney twenty-five dollars to represent him before the justice in the garnishment cases. When the railroad company had been garnished the third time, Cooper went to Scyoc and offered to pay him the face of the judgment ($14.20) but Scyoc refused to receive the money, unless Cooper would pay all the costs and threatened then to pursue the railroad company with garnishment until it would either compel Cooper to pay the judgment or discharge him. On May 12, 1900, Scyoc wrote Mr. Crance, superintendent of the railroad as follows:

"Hannibal, Mo., May 12, 1900.

"Mr. S. E. Crance,
"St. Joe, Mo.

"Dear Sir: We write you again concerning Mr. Cooper in your employ who owes us a bill and refused to pay. We have garnished his wages several times but to no result. We ship by the Hannibal & St. Joe and K. Line altogether. That we are good patrons of your road can be found out by writing your agent here. But we can not longer patronize people who keep in their employ parties refusing to pay just and honest bills.

"Please give this matter your immediate attention.

"Yours truly,
"D. R. Scyoc & Co."

George M. Harrison, attorney for Cooper before the justice of the peace, testified as follows:

"I am a lawyer and live in Hannibal; have practiced law since 1867. I was Cooper's counsel in case before Justice Scott in which judgment was obtained. I represented Cooper in all the garnishment cases, nine in all, and charged him $5 in each garnishment. I had several talks with Scyoc about the matter. During that

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time Cooper was out of employment about four or five weeks by leave of the company. Scyoc said to me at Craft Hotel, 'Well, by God, I've got him, Cooper is out.' I said, 'But Cooper told me that he had laid off to repair his house.' 'No,' he says, 'That ain't true, I have got him, I knew I would get him, I will have him discharged for good.' Some time in November, Scyoc said to me in reference to Cooper, 'I'm after him again, I will keep after him until I get him.' He told me at one time that he had written the railroad company that if they did not discharge Cooper he would withdraw his patronage from the road."

W. L. Fitzgerald testified as follows:

"I am general agent of the Burlington Route, with offices at Hannibal, and have been since August, 1900. I had in my possession a letter written by Scyoc to Mr. Crance, superintendent of the road, and I talked with Scyoc. He said we would either have to make the man pay the bill or discharge him or lose his business, and he got rather abusive to me and the railroad and Mr. Cooper. He said Cooper was a damn thief and that he proposed to get his money or he would make him and the company regret it. I told him I had the letter he had written to Crance. I stated to Scyoc that it would not be policy for the company to employ a confirmed dead-beat, but I believed Cooper's attorneys had advised him not to pay the bill and we thought it was not a case where we ought to interfere and that our superintendent had instructed me to advise Mr. Scyoc, and on that account I had the talk with Scyoc. I am a solicitor of business, and I tried to explain it to him so he would see it in our light. I did not succeed. He stated he would show the road whether they could keep a dead-beat in their employ and not lose money by it. He said he thought if I was so damned smart that I could come here and run the railroad and its customers he would show us."

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I. N. Wilbur testified as follows:

"I am master mechanic of the St. L., K. & N. W. R. R. Co., and have been since 1896. The plaintiff Cooper, was in our employ until he was relieved, February 22, 1902. I was master mechanic of H. & St. Joe before it was merged. It is all C., B. & Q. I gave Mr. Shryock, Cooper's foreman, orders to discharge Cooper for the reason that he was garnished so often. It made so much annoyance for the company. He was garnished by Scyoc nine times. We had no other reason for discharging him."

On February 22, 1902, Mr. Wilbur wrote the following letter:

"Hannibal, Mo., Feb. 22, 1902.

"Mr. G. M. Shryock, M. C. B.,

"City.

"Dear Sir: C. F. Cooper has had the ninth garnishment served against him by D. R. Scyoc, and our general superintendent thinks that we have favored him about as long as we can consistently. It is therefore necessary to relieve him from the service. Please notify Mr. Cooper accordingly and say to him that as soon as the garnishment is released he can call at my office and get a check for the amount due him.

"Yours truly,

"I. N. WILBUR."

On the same day Cooper received the following notice of his discharge:

"Hannibal, Mo., Feb. 22, 1902.

"Mr. C. F. Cooper,

"Hannibal, Mo.

"Dear Sir: Next attached please find copy of Mr. Wilbur's letter to me this date, which explains itself. Please turn in to your foreman any company tools that you now have.

"Yours truly,

"G. M. SHRYOCK."

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Plaintiff testified that Scyoc knew he had a family, knew of his financial condition and knew that it took all his wages to support himself and family; that after his discharge it was six weeks before he found any employment and that his employment had been irregular, that he was frequently out of work and had not earned as much per annum as when working for the railroad company. Scyoc, in his own behalf, testified that he thought he could get the two weeks' wages held back by the company from Cooper, but found out that he could not; that he knew Cooper had claimed his exemption, but thought by garnishing the railroad company from time to time they would make Cooper pay up. He denied that his object was to force the railroad company to discharge Cooper if he did not pay the judgment.

Defendant moved the court to instruct the jury that on the evidence plaintiff was not entitled to recover. This instruction was refused and the issues were submitted to the jury on the evidence and instructions given by the court. The jury found the issues for the plaintiff on both counts of the petition. On the first they assessed his actual damages at twenty-five dollars and punitive damages at three hundred dollars, and on the second count assessed the actual damages at one hundred and seventy-five dollars and punitive damages at three hundred and forty-one dollars. Timely motions for new trial and in arrest of judgment were filed by the defendant. These were overruled and defendant appealed to this court.

BLAND, P. J. (after stating the facts as above.)—
1. Should the plaintiff have been nonsuited at the close of his evidence? The evidence is so clear and convincing as to leave no reasonable doubt that the defendant maliciously directed the repeated service of summons on the railroad company as garnishee, when he had no reasonable ground to believe that anything could be collected from the railroad company as the debtor of the

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plaintiff, and knew that the wages of the plaintiff he sought to garnish were exempt from process of garnishment, and that his purpose in having repeated service of summons on the railroad company, as garnishee, was to either force the plaintiff to pay the judgment and costs, or to so annoy the railroad company with process of garnishment as to cause it to discharge plaintiff from its employ. It is contended by the defendant, however, that conceding he was actuated by express malice and that his purpose was to oppress the plaintiff, and that he knew the process of garnishment would not be available for the collection of the judgment or any part of it, yet he had a legal right to order the executions and to have them renewed from time to time and to order the constable to garnish the railroad company, and being possessed of this legal right he can not be mulct in damages for the exercise of it, notwithstanding his motive. If nothing more had been done than the mere suing out of the executions and having them served from time to time on Cooper, and if no attempt had been made to levy upon property exempt, or to garnish wages that were exempt, no right of action could have accrued to Cooper, for it is a well-settled rule in English and American jurisprudence that an action for damages will not lie for the suing out of civil process where neither the person nor the property of the debtor is wrongfully interfered with. See 21 American Law Register, 281 and 353, where the authorities on this point are reviewed at length by John W. Lawson, Esq. But where the property of the defendant has been unlawfully taken by execution, or has been impounded by process of garnishment, and the taking or impounding of it was malicious and without probable cause to believe that it might be lawfully taken or impounded, and the defendant is prejudiced thereby in person or property, it seems to us it furnishes a foundation for an action.

In Churchill v. Siggers, 3 El. & Bl. l. c. 936, Lord Campbell said:

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"To put into force the process of the law maliciously and without any reasonable or probable cause is wrongful; and if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case. Process of execution on a judgment seeking to obtain satisfaction for the sum recovered is prima facie lawful; and the creditor can not be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied and that execution was sued out for a larger sum than remained due upon the judgment. Without malice and the want of probable cause, the only remedy for the judgment debtor is to apply to the court or a judge that he may be discharged, and that satisfaction may be entered up on payment of the balance justly due. But it would not be creditable to our jurisprudence if the debtor had no remedy by action where the person or his goods have been taken in execution for a larger sum than remained due on the judgment, this having been done by the creditor maliciously and without reasonable or probable cause: i. e. the creditor well knowing that the sum for which execution is sued out is excessive, and his motive being to oppress and injure the debtor. The court or judge, to whom a summary application is made for the debtor's liberation, can give no redress beyond putting an end to the process of execution on payment of the sum due, although, by the excess, the debtor may have suffered long imprisonment and have been utterly ruined in his circumstances."

A case in its facts on all fours with the one at bar is Nix v. Goodhill, 95 Iowa 282, where it was ruled that an action will lie against one who maliciously and without probable cause, garnishes the exempt earnings of his debtor, knowing them to be exempt, for the purpose of harrassing the latter's employer, thereby compelling him to pay out of such exempt money in order to avoid discharge. See also Bartlett v. Christhilf, 14 Atl.

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(Md.) 518, and 1 Addison on Torts (4 Ed.), 755; Crownfeldt v. Arrol, 50 Minn. 327; Lynd v. Jones, 7 Minn. 184; Harrington v. Smith, 14 Colo. 376.

On principle, an action for wrongfully, maliciously and without probable cause levying an execution upon exempt property of the debtor or garnishing his wages that are exempt, can not be distinguished from an action for maliciously and without probable cause levying an attachment against a debtor or garnishing his exempt property. Both are equally an abuse of judicial process. While a judgment creditor may have executions issued to all counties in the State in which his debtor has property subject to be taken on execution, and while he may with malice in his heart remorselessly pursue the property of his debtor for the satisfaction of his debt with impunity, provided he demands no more than is due, does not direct an excessive levy, or the levy and seizure of property exempt from execution, yet if he directs the officer to seize and levy upon property of the debtor that the law exempts from execution, and the officer makes the levy and seizure, both he and the creditor would be guilty of trespass and be jointly and severally liable to the debtor for the damages. If instead of seizing and levying upon exempt tangible property, the officer, by instructions of the creditor who is prompted by malice, impounds the wages of the debtor that are exempt from garnishment by summoning his employer as garnishee, and the creditor knows that the wages to be impounded are exempt, it seems to us, is as gross an abuse of judicial process as in the case of the levy and seizure of exempt tangible property. While the damages might not be so great as in the case of levy and seizure, yet there would be an abuse of the process, a wrong done and an injury inflicted to the debtor for which the law should afford some remedy. A discharge of the garnishee by the court and the taxing of the costs of the garnishment to the creditor would not be an adequate remedy, in fact, no remedy at all for the wanton

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abuse of the process of the court, no remedy to the debtor for his loss of time and expense in defending against the garnishment, nor any compensation to him for the willful and malicious attempt of the creditor to wantonly and wrongfully deprive him of his property under the guise of judicial process. We think the remedy resorted to by the plaintiff in this case is the only adequate one, and that it is sanctioned by law, therefore, we conclude that the petition states a good cause of action and the demurrer to the evidence and motion in arrest of judgment were properly overruled.

2. In respect to the admission of the summonses or notices of garnishment and the returns of the constable thereon as evidence or proof of the fact that the railroad company had been garnished, it is pertinent to remark that the constable was not the plaintiff's agent, that plaintiff had no control over his actions and was not responsible for any omissions of that officer to make proper indorsements on the executions. Section 4042, R. S. 1899, provides that garnishees on an execution issued by a justice "shall be summoned in writing as garnishees," etc. The summonses issued and served on the railroad company conformed to this statutory provision and the constable's return on them showing that they had been served on the garnishee are, it seems to us, the original evidence of the fact of the service of process of garnishment, and that the indorsement of the fact on the execution would be but cumulative evidence.

3. Defendant objected and excepted to the instructions given for plaintiff and especially complains of the following of the series:

"1. If the jury shall believe and find from the evidence that at the time of the delivery to the railroad companies of the notices of garnishment in evidence the plaintiff resided in this State and was the head of a family as explained in instruction No. 2, then the court instructs the jury that plaintiff's employees were not

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chargeable as garnishees on account of wages due plaintiff for the last thirty days service next before the service of such garnishments and the defendant had no right to cause plaintiff's employer to be summoned as garnishee on account of such wages due plaintiff or to attempt to subject them to the payment of defendant's judgment.

"3. If the jury shall believe and find from the evidence that defendant caused and directed the Hannibal and St. Joseph Railroad Company to be summoned as garnishee of the plaintiff at the time of the several garnishments in evidence on the original execution in evidence, and that at the time of the service of said garnishments the plaintiff was an employee of the said railroad company working for wages, and that he resided in Marion county, Missouri, and was the head of a family as explained in instruction No. 2, and that at the time of the service of said garnishments the said railroad company did not have in its possession or under its control any property, money or effects of the plaintiff, and did not owe plaintiff any money except such as was exempt from seizure or garnishment as explained in instruction No. 1, or such as was subject to be selected and held by plaintiff as exempt as explained in instruction No. 2, and if the jury shall believe and find from the evidence that the defendant at the time of causing or directing such garnishment to be served had no reasonable or probable cause for believing that said railroad company had in its possession or under its control, property, money or effects of plaintiff, or owed plaintiff money which might lawfully be held on such garnishments and taken in satisfaction of said execution, yet nevertheless, that defendant caused and directed said railroad company to be so summoned as garnishee of plaintiff maliciously and for the purpose of compelling payment of his judgment out of plaintiff's wages, at the same time knowing plaintiff's rights of exemption herein, or that defendant caused or directed said garnish-

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ments to be served on said railroad company maliciously and for the purpose of harassing and annoying said company and causing it to discharge plaintiff from his employment unless he paid defendant's judgment, then it will be the duty of the jury to find their verdict for the plaintiff on the first count of the petition in this cause.

"7. If the jury find for the plaintiff on the first count of the petition, they should allow and assess in his favor, first, such actual damages not exceeding one thousand dollars, as under the evidence they may believe he has sustained and which will reasonably compensate him for any reasonable expenses, if any incurred by him, directly occasioned by and resulting from the defendant's acts and conduct as shown by the evidence; and second, and in addition thereto, the jury may also allow and assess against the defendant such further sum by way of exemplary or punitive damages, not exceeding one thousand dollars, as will in their opinion, sufficiently punish the defendant for the wrong and injury done the plaintiff.

"If the jury allow exemplary damages the amount thereof must be separately stated in their verdict.

"8. If the jury find for the plaintiff on the second count of the petition, they should allow and assess in his favor, first, such actual damages, not exceeding one thousand dollars, as under the evidence they may believe he has sustained and which will reasonably compensate him for his loss of time, if any, his expenses, if any, and his loss of employment, if any, directly occasioned by and resulting from defendant's acts and conduct as shown by the evidence; and, second, and in addition thereto, the jury may also allow and assess against the defendant such further sum by way of exemplary punitive damages, not exceeding one thousand dollars, as will in their opinion, sufficiently punish the defendant for the wrong and injury done the plaintiff."

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Instruction No. 1 properly declared the law. Plaintiff had claimed his exemption rights at the beginning and continued as the docket of the justice shows, to make his claim of exemption. Even if he had made no claim to his exempt wages, there is no evidence that he waived his right, and without a waiver they could not be subject to the process of garnishment (section 3435 R. S. 1899) nor were the wages due the plaintiff from the railroad company subject to be taken on the execution in any form after he had shown, as he did, that his personal effects and wages did not at any time exceed three hundred dollars. Section 3159, R. S. 1899; Harrington v. Smith et al., 14 Colo. 376. The criticism of the third instruction is answered by the first paragraph of this opinion. It is contended that the seventh and eighth instructions direct the jury to find punitive damages. They do not so read. They leave it to the discretion of the jury to find or not to find such damages, and as the case is one in which punitive damages may be allowed (Coleman & Newsome v. Ryan, 58 Ga. 132; Cronfeldt v. Arrol, 50 Minn. 327), we think the instruction was proper. The further objection to the eighth instruction is that it authorized the jury to assess damages for loss of plaintiff's time after he was discharged by the railroad company. No case has been cited, nor have we been able to find one, where in a case like this the plaintiff was entitled to damages for loss of time by being thrown out of employment. It was not in the power of the defendant to discharge him nor to compel the railroad company to do so. The act of discharging plaintiff was that of the railroad company, not of the defendant. It is true that the evidence shows that the wrongful and malicious conduct of the defendant, in annoying the railroad company by repeatedly summoning it as garnishee, was the cause that moved the company to discharge the plaintiff. The conduct of the defendant was perhaps the remote cause of plaintiff's discharge but it was not his act and for this reason we do

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not think defendant is liable for his loss of time directly caused by the act of another with whom defendant was not acting in concert.

4. It is finally contended that it was the duty of the constable to have protected the plaintiff from the unlawful and oppressive use of the execution in his hands and that he erred in serving the summons of garnishment on the railroad company. All this may be granted, yet the fact remains that the constable, in all he did, obeyed the express directions of the defendant, and all he did was expressly ratified by the defendant. In such circumstances the law is well settled that the officer and the defendant are jointly and severally liable for the wrongful acts of the officer. 12 Am. & Eng. Ency. of Law (2 Ed.), p. 250; Duncan v. Frank, 8 Mo. App. 286; Kreher v. Mason, 25 Mo. App. 290; Palmer v. Shenkel, 50 Mo. App. 571; Wetzell v. Waters, 18 Mo. 396.

For error in authorizing the jury to assess damages for loss of time the judgment will be reversed and the cause remanded, unless within ten days from the date of the filing of this opinion plaintiff remits one hundred and seventy-four dollars of the actual damages awarded by the jury on the second count of the petition; if the remittitur be entered as herein provided it is ordered that the judgment shall stand affirmed for the balance of the damages awarded by the jury on both counts. *Reyburn* and *Goode, JJ.*, concur.

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U. S. WATER & STEAM SUPPLY COMPANY, Respondent, v. DREYFUS, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **AMENDMENTS.** **Amendments are largely discretionary with the trial court, and in a cause pending in the circuit court, which had originated before a justice of the peace, an amendment showing that plaintiff was a corporation was properly allowed.**

2. **TENDER: Acceptance of Conditional Tender. The acceptance of a tender which is made upon condition that it is in full satisfaction of the debt, does not discharge the balance unpaid, or bar an action therefor, unless there is a dispute in good faith as to the amount due; there is no consideration for such acceptance.**

Appeal from Greene Circuit Court.—*Hon. J. T. Neville*, Judge.

AFFIRMED.

Wright Bros. & Blair for appellant.

(1) The plaintiff should not have been allowed to amend the statement showing that it was a corporation after the trial had begun. Defendant denied his liability for any amount except the $14.32 which amount he tendered in full settlement, which amount was accepted with the conditions offered. Plaintiff can not accept a tender and prescribe terms of acceptance. It could only accept in full settlement or reject and return the amount tendered. Adams v. Helm, 55 Mo. 468. (2) The letters of defendant to plaintiff disclose terms of tender; the other evidence abundantly discloses a disagreement as to amount and liablity. School Board v. Hull, 72 Mo. App. 403. (3) There was a novation which released defendant except as to the $14.39; there was a tender of the $14.39 with a condition which was accepted and defendant was released in full. There was a dispute or contention as to liability and as to the amount. Waack v. Schneider, 51 Mo. App. 92, 100-2.

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Heffernan & Heffernan for respondent.

(1) A tender to be sufficient must be unconditional. Henderson v. Cass Co. 107 Mo. 56. A partial payment of a debt is ordinarily no satisfaction of the residue. Young v. Schofield, 132 Mo. 652; Comstock v. Lenger, 78 Mo. App. 390. (2) The court properly allowed the amendment. The Weed Sewing Machine Co. v. Philbrick, 70 Mo. 646; Stewart v. Glenn, Adm., 58 Mo. 481. Amendments should be liberally allowed in furtherance of justice. Ragan v. Railroad, 111 Mo. 456. Provided the amendment does not change the cause of action. Hobel v. Railroad, 140 Mo. 159; Heman v. Galme, 129 Mo. 325. (3) Objection that verdict or finding is excessive can not be made the first time in appellate court. Orr v. Rode, 101 Mo. 387; Ridenhouse v. K. C., 102 Mo. 270-299. (4) Where judgment is manifestly for the right party the court will not reverse. Orth v. Dorschilia, 32 Mo. 366; Heny v. Railroad, 113 Mo. 525; Burns v. City of Liberty, 131 Mo. 372; Comfort v. Ballingal, 134 Mo. 281.

REYBURN, J.—From a judgment before a justice of the peace, defendant appealed to the circuit court of Greene county, where he raised the objection that the account sued on did not show upon its face whether respondent was a partnership or incorporated; the court permitted respondent to add the words "a corporation" to its title and subsequently an amended statement was filed by leave of court and a jury being waived, the case proceeded to trial before the court.

The evidence developed that appellant, a resident of Springfield, bought a bill of goods from respondent at office of the latter in Kansas City, amounting to $104.39, for cash, the shipment was made but payment was withheld despite repeated demands for the debt, and in the end the appellant sent a draft for $14.38, together with an order on one Seymour for $90, to be in

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full settlement of the indebtedness. Respondent declined the order and returned it, but placed the $14.38 to the credit of appellant and subsequently brought this action for the balance.

The testimony on behalf of plaintiff was in form of depositions of witnesses in its employ conversant with the transaction and some correspondence between the parties. At trial in the circuit court, the appellant first testified and stated that before purchasing the merchandise an agreement was had with respondent, through its secretary and manager, that an indebtedness of $90 from one of plaintiff's workmen, one Seymour, to defendant, should be accepted by the plaintiff in payment of any goods bought, and if the amount of his purchase exceeded the sum due by Seymour, a draft for such difference would be accepted and that he bought on such condition and terms. On cross-examination he conceded that such defense was not made before the magistrate, that in three letters written to plaintiff after buying, he made no mention of such arrangement and in frequent subsequent visits to Kansas City he had not visited plaintiff's place of business to claim benefit of the agreement, explaining that he took it for granted that plaintiff understood it, or it had escaped his own recollection in writing, and that he had communicated with plaintiff by telephone in Kansas City, asking a compromise before suit was brought. Pending the cross-examination of defendant, at request of plaintiff's attorney, an adjournment was granted to the next day to afford plaintiff's manager referred to in defendant's testimony, whose deposition had been taken and offered, an opportunity to appear at the trial and upon his arrival from Kansas City, he further testified orally, detailing the only conversation with defendant in which defendant made inquiries regarding his debtor Seymour, and requesting plaintiff's aid in enforcing payment, which was refused, and denying also defendant's version of the telephone communication, and stating that after

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the first conversation with defendant he heard no more of the account against Seymour until the order accompanied the draft. At the close of the testimony, the court refused an instruction for defendant to the effect that if the court found that plaintiff demanded of defendant an account for $104, and defendant then disputed the claim and as a result of such contention defendant tendered plaintiff $14.38 in full of all demands, and plaintiff retained such sum, the finding should be for defendant, and declared the law to be that the rule did not apply to this case, because there was no dispute about the amount due, and rendered judgment for plaintiff.

1. The amendment sanctioned by the court descriptive of plaintiff's corporate character was plainly within the scope of the statute. R. S. 1899, sec. 657. Amendments are largely discretionary with the trial court and are to be favored and freely and liberally allowed in furtherance of justice. The amendment entitling the plaintiff corporation in conformity to such undisputed fact could not in anywise prejudice defendant and was properly permitted. Stewart v. Van Horne, 91 Mo. App. 647; Hixon v. Selders, 46 Mo. App. 275; Goddard v. Williamson's Admr., 72 Mo. 131.

2. The law is well settled that an acceptance of a tender of part of a liquidated indebtedness, qualified by the debtor by condition that its acceptance shall be in full satisfaction, does not discharge the balance unpaid or bar an action therefor, unless the dispute as to the sum due is in good faith, otherwise there is no consideration for the acceptance of the lesser for the greater sum. St. Joseph, etc., v. Hull, 72 Mo. App. 403. Regarded most favorably for defendant, the trial court found that the contention regarding the amount of indebtedness from defendant to plaintiff was not made in good faith, and that no just ground existed for such attempted dispute, and this finding is well supported by

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the evidence, and the judgment being manifestly for the right party, is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

NAGEL, Respondent, v. ST. LOUIS TRANSIT COMPANY, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. STREET RAILWAYS: Evidence: Vigilant Watch Ordinance. In an action against a street railway company for damages caused by a collision of defendant's car with plaintiff's wagon, a vigilant watch ordinance of the city may be introduced without first proving that defendant had contracted with the city to abide by its terms.

2. ———: ———: Inconsistent Instructions. Appellant can not complain that the instructions are inconsistent where they properly submit the opposing theories of the parties, and the inconsistency, if any, was invited by appellant.

3. EVIDENCE: Impeaching Witness. When it is proposed to discredit a witness by proof of prior contradictory statements, a foundation must first be laid by showing the time, place, etc., and giving the witness an opportunity to explain.

4. ———: ———: Affidavit for Continuance. Under section 687, Revised Statutes of 1899, where an affidavit for a continuance on account of an absent witness sets out what he would swear to, and is introduced as the evidence of such witness, it is competent to impeach the testimony by showing that the witness has made statements which contradict it, and this without laying any foundation.

Appeal from St. Louis County Circuit Court.—*Hon. J. W. McElhinney*, Judge.

AFFIRMED.

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Boyle, Priest & Lehmann and *Kiskaddon & Matthews* for appellant.

(1) The ordinance when offered was competent, and could not be objected to by defendant, for the reason that its acceptance was pleaded. But plaintiff failed to follow the proof of the ordinance with evidence of its acceptance. Therefore, instructions predicated on the ordinance were erroneous. Holwerson v. Railroad, 157 Mo. 216; Day v. Railroad, 81 Mo. App. 471; Anderson v. Railroad, 161 Mo. 411; Sanders v. Railroad, 147 Mo. 411; Schmidt v. Railroad, 163 Mo. 645. (2) The obligation of ordinary care on the defendant's part in such case only begins when he has knowledge of plaintiff's dangerous position, or such notice of it as would put a person of ordinary prudence on his guard, or he may be negligent if he willfully or wantonly conducts himself in such a way as to demonstrate a reckless carelessness of the persons of those who may be in a dangerous position. Kellny v. Railroad, 101 Mo. 67; Strauss v. Railroad, 75 Mo. 185; Hunt v. Railroad, 94 Mo. 255; Morgan v. Railroad, 159 Mo.; Klockenbrink v. Railroad, 81 Mo. App. 351; 3 Elliott on Railroads, sec. 1175; Beach on Cont. Neg. (3 Ed.), secs. 54, 55, 62, 64; Shear. & Red. on Neg. (5 Ed.), sec. 64. (3) The defendant read in evidence the deposition of John Huggins. The plaintiff introduced a witness, Ida Helker, who testified that at some other time and place Huggins had made statements in relation to the collision in which plaintiff claimed he was injured, directly contradictory of the statements in the deposition. To this defendant objected on the ground that plaintiff had not laid the proper foundation for the introduction of such evidence. This objection the court overruled, defendant excepting. This ruling was erroneous. Gregory v. Cheatham, 36 Mo. 155; Spohn v. Railroad, 116 Mo. 617; State v. Grant, 79 Mo. 113; McDermott v. Railroad, 87 Mo. 285. (4) The two instructions given by the court of its own mo-

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tion are inconsistent with the instruction No. 4 given by the court at the instance of plaintiff. The two instructions given by the court instruct the jury that if plaintiff was guilty of contributory negligence he can in no event recover, while instruction No. 4 instructs the jury that if he was guilty of contributory negligence he may under some circumstances recover. Such instructions are contradictory, repugnant and inconsistent, and, for that reason, erroneous. Price v. Railroad, 77 Mo. 508; Stone v. Hunt, 94 Mo. 475; Schneer v. Lemp, 17 Mo. 142; Stevenson v. Hancock, 72 Mo. 612; Jersey Farm Dairy Co. v. Railroad, 103 Mo. App. 90.

Wm. L. Bohnenkamp for respondent.

(1) The ordinance in question under this point of appellant's brief was competent evidence, even though its acceptance by appellant was not proven. That the ordinance may be offered in evidence without proving its acceptance by defendant, is declared to be the law by both this court and the Supreme Court of this State in the following recent cases: Gebhardt v. Railroad, 97 Mo. App. 373; Jackson v. Railroad, 157 Mo. 621; Riska v. Railroad (not yet reported); Wendler v. Peoples House Furnishing Co., 165 Mo. 527. (2) The "vigilant watch ordinance" requires no greater care than ordinary care at common law, and therefore, and for the other reasons given, appellant's objection to the giving of this instruction is altogether without merit. Conrad Grocer Co. v. Railroad, 89 Mo. App. 391. (3) The court did not err in permitting the witness, Ida Helker, to testify that the absent witness, Huggins, had made statements contradictory to those set out in appellant's affidavit for a continuance, because section 687, Revised Statutes 1899, expressly says that the opposite party may disprove the statements of such absent witness, or prove contradictory statements made by such absent witness in relation to the matter in issue and on trial. That

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the ruling of the trial court in this matter is not erroneous is supported by two recent decisions by this court: Freeman v. Railroad, 95 Mo. App. 95; Ely Walker Dry Goods Co. v. Mansur, 87 Mo. App. 105; State v. Miller, 67 Mo. 604; State v. Mann, 83 Mo. 589. (4) Instruction No. 4, given at the request of plaintiff, declares the law correctly, and it is so well settled in this State that it requires no citations; then, if we concede for the sake of argument that the other two instructions are inconsistent with No. 4, and therefore erroneous, appellant can not now complain of this error, because the two instructions complained of were given at the request of the defendant, and the error, if error, was invited by defendant. This principle of law is well settled. Christian v. Ins. Co., 143 Mo. 460; Baker v. Railroad, 122 Mo. 533.

STATEMENT.

Action for personal injuries sustained by plaintiff while driving a single-horse milk wagon southwardly on Broadway, from rear end collision with south-bound car of defendant about one hundred and fifty feet north of Prairie avenue, in the city of St. Louis. The evidence revealed that about a quarter before three o'clock Sunday morning, June 8, 1902, plaintiff drove from Talcott avenue, an intersecting street, upon Broadway and proceeded southwardly on the western track of defendant's double-track electric railway; on the western side of the street beyond the tracks, the roadway between Prairie avenue and Desoto avenue was obstructed by sewer excavations indicated by red lights. The morning was cloudy and misting, the rails damp, and day just breaking, the street lamps being still lighted about the scene of the casualty. He had driven about a block and a half when the wagon was struck by a so-called owl or night car from behind, the horse killed, the vehicle wrecked and plaintiff injured. The assignments of

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negligence made in the petition were that defendant's servant, the motorman, in charge of the car, saw, or by the exercise of ordinary care could have seen, plaintiff and his wagon in a position of peril, and by exercise of ordinary care could have stopped the car or sufficiently reduced the speed in time to avoid injuring plaintiff, and and that the negligent failure of such motorman to use ordinary care to discover plaintiff and his wagon, in a position of peril and after he saw him in such position, or by the exercise of ordinary care would have seen him, his negligent failure to use ordinary care to slacken the speed of or stop the car, and negligent failure to discover plaintiff and sufficiently slacken the speed of such car and stop it, directly contributed to the injury to plaintiff; a further charge of negligence was made based on the so-called "vigilant watch" ordinance of the city of St. Louis, a violation of which was alleged. For its defense, defendant pleaded a general denial with accusation of contributory negligence on plaintiff's part in going upon or near the track in front of a moving car, at a time and place, when and where he might have seen and heard the approaching car, but failed to look or listen for such car, and was injured in consequence. The testimony was in conflict, whether the colliding car had a headlight and whether the gong thereon was sounded until the accident was imminent; whether plaintiff had been continuously in the track, or turned into the path of the car and thereby was struck, was also the subject of opposing testimony of various witnesses. It was shown, however, by testimony offered on behalf of defendant that the car was moving at a rapid rate of speed and ran about eighty feet after the impact with plaintiff's wagon.

REYBURN, J. (after stating the facts as above.)—1. The court is confronted at the outset with a strenuous renewal of a discussion, which was supposed to have received its obituary both from the Supreme Court and

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from this tribunal in compliance with its constitutional obligation to the superior court, namely, that before the vigilant watch ordinance of the city of St. Louis could be properly admitted in evidence, proof of the allegation that defendant had contracted with the city to accept its provisions and abide by its terms must be introduced. The point sought to be revived is not properly preserved for review in this court, for the ordinance was permitted to be offered in evidence without objection thereto, but regarding the contention, that if objection had been duly made and exception to its admission properly saved, the objection would have been unavailing: the Supreme Court, in the late case of Riska v. Union Depot Railroad Company, has reiterated the ruling contained in the final preceding decisions, as well as approving the last opinion of this court to the same effect, and being not yet reported in print, the text may be quoted:

"Another objection urged against this instruction is that no proof was offered that the defendant was in any manner bound by the ordinances read in evidence.

"The violation of these ordinances was not only admitted by defendant, but there was evidence tending to show that but for such violation the deceased would have had ample time to cross the tracks without injury.

"The position of defendant upon this question is, that there must have been an acceptance by defendant company of this ordinance which is generally known as the 'vigilant watch' ordinance, in the absence of the proof of which its provisions are not binding upon defendant company. The ordinance is simply a police regulation for the protection of the lives and property of the citizens, which the city clearly had the right to pass, and which like all other ordinances of a similar character, are not necessarily contractual, but are binding upon all corporations which come within their provisions regardless of the fact of their non-acceptance by such corporations. While the same ordinance was not

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passed upon by this court in either the cases of Jackson v. K. C., Ft. S. & M. R'y Co., 157 Mo. 621; Hutchinson v. Mo. Pac. R'y Co., 161 Mo. 246; Weller v. C., M. & St. P. R'y Co., 164 Mo. 180, ordinances of similar character were, that in regulating the speed of cars in cities, and it was held in all of them that such ordinances were binding on railroad and street railroad companies, whether their provisions were accepted by them or not. In an able and exhaustive opinion by Judge BLAND, of The St. Louis Court of Appeals, in the case of Gebhardt v. St. Louis Transit Co., 97 Mo. App. 373, 71 S. W. 448, in passing upon a similar ordinance it was held, that it was a police regulation conferring a right of action on a party injured in consequence of a violation of it, without any allegation or proof that the ordinance had been accepted by the street car company.

"The same rule has been subsequently re-affirmed by that court in Meyers v. St. Louis Transit Company, 73 S. W. 379, 99 Mo. App. 363, and in Septowsky v. St. Louis Transit Company, 76 S. W. 693, and can no longer be regarded as an open question in this State."

2. The court below transgressed no legal principle in embodying a special application and definition of the term "ordinary care" in reference to the language of the ordinance in the instruction given of its own motion. Appellant was at liberty to submit to the court any legal interpretation of this legal phrase, if it deemed it essential that the jury should have been further instructed in that direction. The construction of the "vigilant watch" ordinance has been announced by this court and appellant's stricture of the charge to the jury in this respect is without foundation. Gebhardt v. Railroad, 97 Mo. App. 373.

3. The criticism of the action of the lower court respecting other instructions is also devoid of foundation. The instructions censured, as being at war and inconsistent with each other properly and carefully submit the opposing theories of the parties litigant, respect-

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the effect of contributory negligence on part of plaintiff; and if these instructions in any degree were in conflict with each other, which has not been made apparent, the error was of appellant's invitation as with slight modification by the court, they were submitted on its behalf. Christian v. Ins. Co., 143 Mo. 460.

4. The only assignment of error in this record, which at its introduction bore an unfamiliar and uncertain appearence, originated from the admission of the testimony of a witness admitted in rebuttal. An affidavit for continuance on account of absence of a witness, embodying the particular facts expected to be proven by him, was introduced as the evidence of such witness; for purpose of impeachment, the stepdaughter of such absent witness was offered by plaintiff, and permitted to testify that on the same morning he had described to her the collision, and in such narrative had made statements of substantial details attending it, directly contradictory of and conflicting with the recitals in the affidavit read in evidence. The insurmountable difficulties attending the laying of any foundation, preliminary to introduction of such discrediting testimony, are at once manifest, for no opportunity whatever is afforded for directing the attention of the non-attending witness to the statements intended to be impugned, which is strongly illustrated in the present instance, when the location of the absent witness appeared unknown even to members of his family. The law is well established that when it is proposed to discredit a witness by proof of prior contradictory statements, as a foundation to justify the reception of such evidence, the witness must be first interrogated as to time, place and persons of such varying statements; the reason for such rule being found in a spirit of fairness and justice to the witness, whose testimony is sought to be undermined, to afford him an opportunity to refresh his memory and to make such further explanatory or reconciling avowals as he may consider essential. Spohn

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v. Railway, 116 Mo. 617. With such rigor has the doctrine been enforced, requiring a fair opportunity to be offered a witness to explain or reconcile statements out of court apparently conflicting with declarations in evidence, that in instance of a letter written by a witness after his deposition had been taken, proposed to be used for impeachment, it was held in an early case, the deposing witness should be re-examined by new commission, and his attention directed thereto before such use would be tolerated. Gregory v. Cheatham, 36 Mo. 155; State v. Grant, 79 Mo. 113. The section of the statute, permitting such affidavits to be conditionally employed in lieu of formal testimony of absent witnesses, provides that the opposite party may disprove the facts disclosed, or prove any contradictory statements made by such absent witness in relation to the matter in issue and on trial. R. S. 1899, sec. 687. By act approved February 17, 1875, the twenty-eighth General Assembly of the State of Missouri amended section 9, article 9, chapter 169, Wagner's Statutes, and added this clause permitting the opposite party to disprove the facts revealed or prove any contradictory statements of such absent witness. Laws of Missouri, 1875, p. 104.

In the case of State v. Miller, 67 Mo. 604, the effect of this act was before the Supreme Court, and it was held that the allegations contained in an affidavit for continuance, read as testimony of the non-attendant witness, might be attacked and controverted without foundation as expressly authorized by the statute. In Ely Walker Dry Goods Company v. Mansur, 87 Mo. App. 105, the authorities are industriously collated and reviewed elaborately in discussing the purpose and effect of section 3149, R. S. 1899, permitting competent evidence preserved in a bill of exceptions to be used with same effect, as if in form of a deposition in the cause, subject to the condition that the opposing party may offer proof of any matters contradictory as though

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such witness were present and had testified in person, and the conclusion reached, that any foundation for introduction of such impeaching testimony was dispensed with. In principle this case presented the question here involved, and the admirable reasoning leading to and upholding the decision therein announced, is as forcible and decisive in its application to the proposition presented in this case though springing from another section of the statutes.

This record demonstrates that this case was tried with characteristic care and without reversible error therein, the judgment finds abundant support in the testimony and is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

SPALDING, Respondent, v. NESBIT, Appellant.

St. Louis Court of Appeals, February 16, 1904.

OBJECTION TO TESTIMONY: Failure to State Cause of Action. An objection to the introduction of any testimony on the ground that the petition does not state a cause of action, is to be tolerated only where the complaint wholly fails to set forth a cause of action and would be held bad on a motion in arrest.

Appeal from Monroe Circuit Court.—*Hon. David H. Eby*, Judge.

AFFIRMED.

James H. Whitecotton and *Thomas P. Bashaw* for appellant.

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James P. Boyd for respondent.

REYBURN, J.—After this case was remanded by this court (87 Mo. App. 90) upon the ruling therein announced, that upon the testimony introduced by plaintiff the trial court had erred in withholding the case from the jury by granting the instruction directing a verdict for defendant, the cause was retried and a verdict in favor of plaintiff returned, with damages assessed in a nominal sum. The amended complaint adopted at both trials was as follows:

"Plaintiff, for his third voluntary amended statement, filed by leave of court, says that on the — day of ——, 1898, he bought of the defendant the meadow on a certain inclosed field with the privilege of stacking the hay cut therefrom on said inclosed field. That it was at that time agreed between plaintiff and defendant that if plaintiff did not wish to remove his said hay from said inclosed field as soon as defendant might desire to pasture said field during the succeeding fall that plaintiff might let his hay remain therein, provided that he would fence the stacks of said hay with a suitable fence of posts and wire sufficient to turn ordinary stock under ordinary circumstances. That on the — day of ——, 1898, thereafter, and while plaintiff's said hay was still on said field, defendant notified plaintiff that he wanted to pasture said field. That thereupon plaintiff caused his said stacks of hay to be fenced with a good and suitable fence of post and wire sufficient to turn ordinary stock under ordinary circumstances. That thereafter defendant turned into said inclosed field one hundred and fifty head of cattle, and that said cattle thereupon broke down and through the fences around plaintiff's stacks of hay and ate and destroyed ten tons thereof of the value of fifty dollars to plaintiff's damage in the sum of fifty dollars for which with costs he prays judgment."

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To which defendant filed a general denial.

The evidence of plaintiff disclosed a state of facts similar to that at former hearing and in effect, that in 1898, J. A. Spalding bought for himself and his son, respondent herein, thirty-six acres of growing meadow-grass of the appellant for seventy-two dollars, with privilege of harvesting and stacking it on the ground. The crop of grass was cut and ricked on the premises, and divided, respondent taking four ricks and his father the one remaining and respondent paid appellant the agreed price for the grass. Early in the fall the appellant notified respondent that he wanted to turn some young cattle to pasture on the meadow, and asked respondent to fence or remove the hayricks; after discussion between respondent and appellant of the character of fence necessary to protect the hay from the cattle, appellant said he thought a post and wire fence of from two to three wires would afford ample protection, and before any cattle were turned on the meadow, respondent inclosed his ricks with a post and wire fence of two and three strands of wire and braced most of the corners. On October 17th following, and during a snow storm, appellant turned one hundred and fifty head of cattle on the meadow, when by reason of the depth of the snow they could not reach the growing grass beneath, and these cattle broke down the fences around the hay and ate and destroyed from eight to ten tons, worth not less than five dollars per ton.

The evidence offered by defendant, consisted of the testimony of himself and other witnesses controverting the chief statements of plaintiff's witnesses regarding the fence and the cattle, and upon which reliance for recovery was founded. At the commencement of the trial, defendant objected to the introduction of any testimony, charging that the third amended complaint did not state a cause of action, which the court overruled and appellant now assails the statement of the plain-

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tiff's cause of action as insufficient and defective. The practice of thus objecting to introduction of testimony, for the reason that no cause of action is stated, has been repeatedly condemned by the Supreme Court as well as by this court, and the rule is stated here to be, that such method is to be tolerated only where the complaint, by liberal construction or reasonable intendment wholly fails to set forth a cause of action, when the pleading is void of any legal efficacy, so that a motion in arrest of judgment based thereon would have to be sustained. Goldsmith v. Candy Co., 85 Mo. App. 595. Measured by such test, the statement of plaintiff's cause of action herein, while brief, contains essential averments adequate to sustain a verdict.

2. Various objections are made to the instructions given by the court at instance of plaintiff and of its own accord, which have been fully considered and are not deemed tenable or justifying elaborate review and discussion. Nor are the complaints made on behalf of defendant warranted, that the imperative instruction asked should have been given, either at close of plaintiff's case or at termination of all the testimony, or that defendant's rejected instructions should have been given. The first objection is fully met and answered by the decision upon the first appearance of the case in this court, that upon the testimony then submitted, substantially the same now, the case should have been committed to the jury. The instructions submitted on defendant's behalf, which the court declined to give were properly refused; in part they were already embraced in the instructions given, and in part, contained commentaries upon the evidence and lacked support in the testimony.

The questions presented by this record involved essentially issues of fact, particularly appropriate for consideration and decision by a jury, and were submitted upon instructions fairly presenting them, and no reason

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has been advanced to authorize us to disturb the conclusion of the jury.

The judgment is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

CROW et al., Respondents, v. WILLIAMS et al., Appellants.

St. Louis Court of Appeals, February 16, 1904.

1. **FORCIBLE ENTRY AND DETAINER: Damages on Appeal Bond.** In an action for forcible entry and detainer, on appeal in the circuit court, it is error to include, with a judgment of restitution, a summary judgment for damages against the principal and sureties on the appeal bond.

2. **JUDGMENT: Not an Entirety: Reversing as to Some of the Parties.** A judgment is not such an entirety as to prohibit correction by reversal as to one or more of the parties, where the substantial rights of the other parties as to whom it is affirmed, will not be impaired thereby.

Appeal from Newton Circuit Court.—*Hon. H. C. Pepper*, Judge.

AFFIRMED.

E. B. Chestnut for appellant.

(1) It stands uncontradicted that Williams leased to Hyatt and Brown on the twenty-seventh day of January, the land in controversy, and that Hyatt and Brown entered into the exclusive possession thereof on the twenty-eighth of January. This suit was commenced on the twenty-first day of February, 1903. The judgment against Williams must be reversed. Orrick v. Public Schools, 32 Mo. 315. (2) The plaintiffs can not maintain this suit against Williams for the reason

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that they (plaintiffs) were at no time in the exclusive possession of the premises. See reservation in clause 5 of lease. Nelson v. Nelson, 30 Mo. App. 184. (3) And again plaintiffs can not maintain this action against Williams for the further reason that clause 6 of the lease, expressly authorizes Williams to re-enterupon and hold the demised premises without notice or due process of law. Krevet v. Meyer, supra; Garvey v. Gunther, 51 Mo. App. 545; Fisher v. During, 53 Mo. App. 553; Chynowitch v. Mining Co., 74 Mo. 174. (4) This judgment must be reversed in its entirety because it is against the securities as well as the principals on the appeal bond. Hulett v. Nugent, 71 Mo. 134.

W. Jones for respondent.

REYBURN, J.—This, an action of forcible entry and detainer, was begun February, 1903, before a justice of the peace in Newton county, and from jury trial and judgment in favor of complainants, defendants appealed to the circuit court, where, upon trial anew, a jury returned a verdict of guilty against all the defendants with damages assessed at $90; the complaint appears to have been devoid of claim for any rents or profits. After unsuccessful motions for new trial and in arrest, defendants have appealed to this court.

The realty, possession of which is at stake, comprised twenty acres in the mineral region of which defendant Williams was and is the owner, and the contest is between complainants, who assert rights as his lessees under a lease from him of date August 27, 1900, for term expiring October 6, 1909, according to lessees for royalty named, the privilege of mining in and upon the realty in good faith, with right to erect necessary buildings and machinery for purposes of mining, crushing and dressing ores, but reserving to lessor all uses of the ground not inconsistent with proper mining. This instrument further provided that a failure to comply with

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its requirements in good faith should determine and end the term, and lessor might declare an ouster and re-enter without notice or legal process. Brown and Hyatt, codefendants of Williams, likewise claim as tenants of the latter; but as to the particulars of the agreement between them, the record is silent. Complainant Crow, on behalf of his colessee and himself entered into possession of the land and proceeded to prospect and mine for lead and zinc until a period, the exact date of which is in issue, but until or shortly preceding the alleged forcible entry January 29, 1903. Inferentially it was disclosed that a forfeiture had been sought to be declared by the lessor, but the steps taken toward enforcing the right of re-entry reserved in the lease are not exhibited. The issue, toward which the bulk of the testimony of the numerous witnesses was addressed, was whether complainant Crow by continuous mining operations on the land remained in its possession at the date assigned, or had abandoned its possession under the lease. The jury were abundantly instructed by a series of instructions, five asked by complainants and a like number at instance of defendants being given, and four asked by defendants refused, inclusive of an imperative instruction presented both at termination of plaintiff's case in chief and of all the testimony. The instructions, other than demurrers to the evidence, were predicated in part upon the theory that the lessor Williams had reserved rights as to the surface of the land under the indenture of lease; but the evidence disclosed that his codefendants were in possession engaged in mining upon the property, and no exercise of the rights excepted from the lease is established; the remaining instruction declined required the jury to find that complainants, while in actual, open and exclusive possession were dispossessed and ousted, which would have been erroneous, especially under the purpose and language of the lease.

The judgment rendered is assailed as embracing,

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additional to decree of restitution of the lands, described in the complaint, a general judgment for the amount of damages assessed by the jury, doubled and made a general judgment as well as against all the defendants and also their two sureties on the appeal bond filed in perfecting appeal to the circuit court. In the absence of statutory authority a summary judgment against sureties as well as principals on the appeal bond in an action of this character can not be maintained. Hadley v. Bernero, 97 Mo. App. 314; Hulett v. Nugent, 71 Mo. 131; Keary v. Baker, 33 Mo. 603. Nor is there any evidence warranting a judgment against Williams, the owner and lessor of all parties; the record is barren of any evidence tending to connect him with the acts of his codefendants, either in dispossession of complainants or in usurping possession, and the judgment was also erroneous as to him. Orrick v. Public School, 32 Mo. 315. The rule of law that a judgment in an action at law was an entirety and that if it was vacated as to one must be annulled as to all the parties defendant against whom it was rendered, was adopted by numerous of the early decisions of the Supreme Court. This rule, however, has been relaxed and from the later decisions may be deduced the present doctrine that a judgment is not now regarded as such an entirety as to prohibit amendment or correction by reversal as to one or more of the parties, where the substantial rights of the other parties thereto will not be thereby impaired. Neenam v. City of St. Joseph, 126 Mo. 89; Hadley v. Bernero, 97 Mo. App. 314; Patterson v. Yancey, 97 Mo. App. 681; Christopher, etc., Co., v. Kelly, 91 Mo. App. 93.

The judgment herein is therefore affirmed as to defendants Marion F. Brown and E. R. Hyatt and reversed as to defendant L. F. Williams and the sureties P. L. Schwartz and L. H. Ornduff. *Bland, P. J.*, and *Goode, J.*, concur.

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NEVILLE, Respondent, v. HUGHES, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **COVENANTS: Dependent and Independent.** In an action by the vendee for breach of warranty of title to chattels, a covenant in the contract of sale, binding plaintiff to do certain things, which did not go to the entire consideration and was to be performed at a different time from that of the transfer of title, was an independent covenant, and it was not necessary to plead and prove performance of it in order to recover.
2. **VENDOR AND VENDEE: Warranty of Title: Notice to Vendee of Defect.** Previous knowledge by vendee of a defect in the title to the property purchased, is no defense to an action on a covenant warranting the title.
3. **EVIDENCE: Parol Testimony to Vary Written Contract.** Parol testimony is not admissible to enlarge or vary the terms of a written contract which is complete within itself.
4. ———: ———: **Consideration.** Nor is it permissible, under the mask of establishing an additional consideration, to show that a party to it undertook obligations different from those expressed in the contract.

Appeal from Lawrence Circuit Court.—*Hon. H. C. Pepper,* Judge.

AFFIRMED.

Jas. R. Vaughan for appellant.

(1) Before a party can recover upon a contract he must show that he has himself complied with it. Where an action for breach of contract has been brought it is essential that the pleading aver performance, and that the pleader prove it, and no recovery can be had where the evidence shows that the pleader was the first to break the contract, which is the identical case here upon the part of the plaintiff. Smith v. Keith & Perry Coal Co., 36 Mo. App. 583; Doyle v. Turpin, 57 Mo. App. 84.

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(2) Respondent by his own default rendered it impossible for appellant to make good his guaranty, and hence he was not entitled to recover. Seaman v. Paddock, 55 Mo. App. 296; Jones v. Walker, 13 B. Monroe 163. (3) He who obligates himself to do the very act which is to make his title good, and then fails to comply with such obligation can not complain. of his obligor when such title has failed on account of his primary breach of the contract. Sponable v. Owens, 92 Mo. App. 174; Clendennin v. Paulsel, 3 Mo. 230; Marshall v. Craig, 4 Am. Dec. 647; note to Burdis v. Burdis, 70 Am. St. 830. (4) It is impossible to apply satisfactorily any rule regarding the dependence or independence of covenants to every case, and this case is no exception. The Missouri Supreme Court, recognizing this has said: "The only principle to be extracted from the authorities' numerous cases in relation to the dependence or independence of covenants is, that they are to be construed according to the intention and meaning of the parties and the good sense of the case." Freeland v. Mitchell, 8 Mo. 488; Turner v. Mellier, 59 Mo. 526; Stavers v. Curling, 3 Bing. (N. C.) 368. (5) If the continuation of the issue of the paper was not embraced in the agreement to fill out the subscriptions then defendant Hughes had the right to prove and show that such was the promise on the part of Neville as an additional consideration. Aull Sav. Bk. v. Aull's Admr., 80 Mo. 199; Holt v. Holt, 57 Mo. App. 272; Harrington v. Railroad, 60 Mo. App. 223.

W. D. Tatlow and *J. T. White* for respondent.

(1) Notice or knowledge of a defect in the title of property purchased by the convenantee can not be set up as a defense by the covenantor in an action on the covenant. In this case evidence that the plaintiff had notice of the contract, which gave Harrington a conditional right to the property was properly excluded. Kellog v. Malin,

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50 Mo. 503; Whiteside v. Magruder, 50 Mo. App. 371; Clore v. Graham, 64 Mo. 249; Williamson v. Hall, 62 Mo. 405; Rawle on Covenants, secs. 125-133. (2) The stipulation in the bill of sale whereby the plaintiff agreed, "to fill out all unexpired subscriptions to the Mail without expense to the said H. H. Hughes," is an independent covenant. It was not necessary to plead or prove the performance of it in order to recover. Springfield Seed Company v. Walt, 94 Mo. App. 76; Turner v. Millier, 59 Mo. 526; Sawyer v. Christian, 40 Mo. App. 295; Burris v. Shewsbury, etc., 55 Mo. App. 381, l. c. 389; St. Louis Steam Heating & Ventilating Co. v. Bissell et al., 41 Mo. App. 426; Pfeninghausen v. Shearer, 65 Mo. App. 348; O'Neill v. Webb, 78 Mo. App. 1; Kauffman v. Raeder, 54 L. R. A. 247, 108 Fed. Rep. 171. (3) It is true that the consideration of a contract may be shown to be more or less than, or different from the one recited, but where the statement of the consideration ceases to be merely a recital and becomes contractual in its character, parol evidence is not admissible to add to or alter it. Jackson v. The Chicago, etc., 54 Mo. App. 644; Davis v. Gann, 63 Mo. App. 429; Halferty v. Searce, 135 Mo. 433.

STATEMENT.

For cause of action plaintiff, Neville, averred a purchase, December 29, 1898, from defendant of the Springfield Weekly Mail and printing plant for five hundred dollars; that by the contract of sale, a copy of which was exhibited, defendant Hughes, by his covenant therein guaranteed the conveyance of a clear title to said property to plaintiff; that defendant did not have a clear title thereto but it was conditional and qualified in this, that one Harrington had an interest in such property, valid and subsisting at time of the purchase. That on the ninth of January, 1900, Harrington commenced an action in replevin against plaintiff and de-

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fendant in the circuit court of Greene county to recover the above property, and plaintiff appeared therein, and filed a separate answer admitting, that at time of filing the complaint he was in possession of the property, and denying the other allegations, and affirming that he was then, and at time of service of the writ, owner of the property, entitled to its possession and demanded its return; that he further notified Hughes to defend the action, and the latter filed a disclaimer, denying that he was in possession and asking to be discharged; that upon trial in the circuit court of Wright county, by change of venue, it was adjudged, that Hughes did not have a clear title to the property, but that Harrington was its lawful owner, and the judgment rendered by such circuit court establishing such fact, was affirmed by the St. Louis Court of Appeals, thereby finally determining that on the twenty-ninth day of December, 1898, defendant did not have a clear title to the property, but that it was subject to the condtions and agreements contained in the contract between Hughes and Harrington, and by reason of such contract Hughes' title to such property was conditional and qualified, and the title of plaintiff therein failed, to plaintiff's damage as detailed, for which judgment was asked.

In defense the defendant answered, that on the date named he sold plaintiff the newspaper and plant, including subscription list, good will, etc., for the sum specified, and then and prior he was the owner of the property sold; that on the sixteenth day of August, 1898, he and Harrington being each owners of one-half interest in such property, he then bought Harrington's interest under a contract, by which he was to publish the paper for one year thereafter as a Democratic paper, and to advocate the doctrines of the Chicago platform, and in event he, defendant, failed to so publish such paper, all such property was to revert to and become the property of Harrington, including both his original interest as well as the interest of Harrington thus pur-

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chased. That at time of and long prior to the sale to plaintiff by defendant, plaintiff had full knowledge of the agreement between defendant and Harrington; that the subscription to such paper at time of its original publication had been largely procured through the influence and personal solicitation of defendant and Harrington, and upon the expressed intention and promise of making it a permanent publication, and as a failure to continue such publication would affect the good name and standing in the community of Harrington and defendant, the agreement to continue its publication until August 16, 1899, was so made, and on the twenty-ninth day of December, 1898, it had a bona fide circulation of about six hundred subscribers, many of whose terms of subscription did not expire until August 16, 1899, all of which was well known to plaintiff at time he bought, and this agreement on part of defendant to so publish such paper rendered his title conditional and qualified, as stated in plaintiff's petition; that at and prior to time he sold to plaintiff, plaintiff represented to and agreed with defendant, as part and one of the considerations and a condition of sale, that he would place the paper, and continue its publication, upon a more permanent basis, and likewise agreed that he would fill out all unexpired subscriptions without expense to defendant; and at the time, plaintiff was insolvent and made such promises and representations fraudulently for the purpose of obtaining possession of the property and with no intention of complying therewith. That soon after purchasing such paper, January 5, 1899, plaintiff suspended publication, failed and refused to fill out unexpired subscriptions, and failed and refused to keep his contract to continue its publication to August 16, 1899, and in consequence the title thereto reverted to Harrington. That plaintiff's failure of title to such property was the result of his own voluntary act and he was not entitled to recover, and the answer concluded with a general denial of all other averments of the petition.

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The contract between the parties evidencing the purchase and sale, for the price already stated, of the newspaper with its subscription list and good will, job printing plant and fixtures complete, continued thus: "The said H. H. Hughes guarantees the conveyance of a clear title to said property. The said H. Clay Neville agrees to fill out all unexpired subscriptions to the Mail without expense to the said H. H. Hughes. The said H. Clay Neville is not obligated by this contract to pay any debts which may have been incurred by those who have operated the Mail heretofore."

The evidence introduced for plaintiff consisted of copy of judgment in action by Harrington, being judgment in replevin against plaintiff for property embraced in bill of sale, one cent damages and costs (83 Mo. App. 589), and testimony of plaintiff, who deposed that he was a newspaper man, connected with the Leader-Democrat at Springfield, and conducted the Mail, after he acquired it, for about two weeks when it was seized in replevin as above narrated; that he had discussed with defendant the contingency of suspending, and had transferred the subscription to the Leader-Democrat, and sent the latter paper to all subscribers of the Mail for the term of their unexpired subscription, which was entirely satisfactory to and approved by defendant, who stated it would be better for the subscribers, that the Leader-Democrat was the better paper. That witness had called on Sunday upon defendant, after the replevin suit was brought, and the latter stated he knew the action was to be begun and in reply to plaintiff's statement that he expected defendant to make defense of title, defendant had replied he certainly would do so, and expressed perfect willingness to defend the suit, adding, to make out delivery bond, and he would file it and would refund plaintiff his money without controversy. Upon cross-examination, plaintiff denied that defendant had told him the paper would revert to Har-

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rington in event of suspension, but he acknowledged he knew of the contract with Harrington.

In defense Hughes testified, in form of a deposition, that the agreement of sale to plaintiff was only partially reduced to writing, and he had explained several times to him the nature of the agreement with Harrington regarding the publication and fulfilling the subscription list, and plaintiff knew, what the agreement was respecting these features, that defendant could convey no title unless he continued the publication to August 16, 1899, and fulfilled all the subscriptions, and that a failure would forfeit defendant's rights and the property revert to Harrington, and he denied the conversation mentioned in plaintiff's testimony after the replevin suit was begun; and defendant then offered the contract between Harrington and Hughes.

Testimony was further introduced, to the effect that in December, 1899, the Mail had about five or six hundred subscriptions of its total of fifteen hundred, extending to August, 1899; also the evidence of plaintiff in the replevin action was offered, to the effect that the value of the property was then about eight hundred dollars. The deposition of Harrington was also offered, tending to show that on August 16, 1898, he informed plaintiff of the agreement contemplated between the deponent and Hughes, and after the latter and himself had entered into the contract, he submitted it to plaintiff who read it, and at the time, witness remarked that a failure to publish the paper according to the terms would forfeit it. In rebuttal, plaintiff, being recalled, stated that with defendant he had estimated after suspension, that the amount all the subscribers might demand was about fifty dollars; that before signing the agreement Hughes wanted it more explicit, but plaintiff declined further conditions and informed defendant he would give subscribers some other paper, that he would transfer the list to the Leader-Democrat, and the defendant replied that this would be all right, the subscribers would be

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benefited as the Leader was a better paper. The testimony of plaintiff, respecting the filling out of unexpired subscriptions by sending another paper and the satisfaction of defendant therewith, was admitted over the objection of defendant; the contract between Hughes and Harrington was excluded at objection of plaintiff; those parts of the deposition of Harrington, concerning the knowledge and reading by plaintiff of the contract between Hughes and Harrington, were excluded at objection of plaintiff; and the rebuttal testimony by plaintiff of estimates of amounts payable to subscribers upon suspension was admitted over defendant's objections, and exceptions to such rulings duly saved by defendant.

The court, at close of the testimony, gave an imperative instruction in favor of plaintiff, rejecting the instructions presented by defendant.

REYBURN, J. (after stating the facts as above.)—
1. The question, conspicuous at the outset of this case, is the relation borne toward each other by the reciprocal obligations assumed by the contracting parties in the contract of purchase, and in particular whether the covenant made by plaintiff for the continued publication of the newspaper was a contract so far dependent on the promises of the vendor, as to render the issuance of the paper for the lifetime of those oustanding subscriptions, which might be confined to the sixteenth day of August, 1899, a condition precedent, and its performance essential to recovery for breach by covenantor of covenant of unencumbered title to the property purchased. As in construing and effectuating all contracts, the object and intention of the contracting parties is to be looked for and discovered, if practicable from a survey of the whole instrument, and due effect to their intent be accorded. Among the features also to be regarded in determining whether covenants are dependent, are the times of their performance and whether the covenant considered goes to part or all of the consideration.

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Turner v. Mellier, 59 Mo. 526; St. L., etc. Co. v. Bissell, 41 Mo. App. 426; Sawyer v. Christian, 40 Mo. App. 295. The latter element was formulated into a rule of construction thus expressed by Lord Ellenborough in an ancient case, which has been invoked by this court as well as by the federal tribunal of this jurisdiction: "Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other, but where they only go to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant and shall not plead it as a condition precedent." Ritchie v. Atkinson, 10 East 295; Kauffman v. Reader, 108 Fed. Rep. 171; s. c., 54 L. R. A. 247; Springfield, etc., Co. v. Walt, 94 Mo. App. 76. This principle was further clearly elaborated in the last case thus: "The mutuality of covenants turns on the intimacy of their connection, considered in the light of the entire agreement, whether one was so bound up with the other that the failure of one party to perform a stipulation hindered performance by the other party, or left him without an adequate consideration for performance." In analysis of the expression adopted by the respective parties of the agreement between them, guided by these well-established doctrines, little room for hesitancy or question can exist, that the covenant on the one part to fill out the unexpired contracts for the paper by its continued issuance, and the obligation of warranty of title by defendant, agreements to be performed at varying periods, one operative at time of transfer and the other to be completed in the future, were not mutually dependent but were designed by the parties to be distinct and separate obligations apart and disconnected.

2. Nor could defendant avail himself of the knowledge of the provisions of the contract with Harrington by plaintiff as a defense to his covenant, the basis of this action. The knowledge of both vendor and vendee, that the title to the property in defendant was qualified by

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his agrements with Harrington did not discharge the covenant made with plaintiff. The vendor may warrant his title as clear and perfect to personalty sold, when the vendee as well as he, himself, possesses notice of an outstanding claim; if the vendee usually exacts of the vendor an express covenant against incumbrances as a safeguard against possible but unknown claims, the expediency and prudence of requiring such protection against a menace known to exist and threatening the validity of the title under certain recognized contingencies are the more obvious and reasonable. The evidence of such knowledge by or notice to plaintiff was immaterial and irrelevant and its exclusion proper and appropriate. Whiteside v. Magruder, 75 Mo. App. 364; Kellogg v. Malin, 50 Mo. 496; Williamson v. Hall, 62 Mo. 405; Clove v. Graham, 64 Mo. 249.

3. The defendant, by the language of his defense as well as by the testimony sought to be introduced in its support, under the mask of establishing an additional consideration to the purchase money, endeavored to enlarge and depart from the terms of the contract as executed by proof of the contract between Hughes and Harrington, and by the deposition of the latter. The contract between the parties hereto was complete in itself, and that oral testimony in such event is inadmissible is beyond controversy, and would doubtless be conceded by appellant. As felicitously expressed by the Supreme Court in a recent decision, "The reason underlying the rule is to give stability to written agreements, and to remove the temptation and possibility of perjury, which would be afforded if parol evidence was admissible." Crim v. Crim, 162 Mo. 544.

The appellant, however, with considerable ingenuity, argues that when respondent agreed to fill out the unexpired subscriptions he agreed in effect to publish the Mail till the date in August, already mentioned, being the contract between Hughes and Harrington, and a default in this provision under the contract between

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the latter incurred a forfeiture, and thus the agreement between the parties hereto became in truth and substantially a conditional sale; it may be remarked that if such had been the understanding of the parties, the contract would have been so worded. Further such testimony would be an unwarranted infraction of the fundamental rule above invoked; after much wavering and legal debate, it is now established as a legal principle, quite general in its recognition, that the consideration of a contract at present may be the subject of explanation, in so far as it may be shown to exceed or fall short of the amount recited in the instrument, but where the evidence offered contradicts the recital of the consideration acknowledged, or where the consideration is made part of the contract itself, such parol evidence is inadmissible to modify it. Halferty v. Scearse, 135 Mo. 428; Jackson v. Railroad, 54 Mo. App. 636; Davis v. Gann, 63 Mo. App. 425.

The testimony proffered on behalf of defendant constituted no defense to plaintiff's claim, the instruction directing the jury to find a verdict for the latter was justified under the conditions attending this case, the judgment is for the right party and is affirmed. *Bland, P. J.*, concurs. *Goode, J.*, not sitting, having been of counsel.

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NELSON, Respondent, v. HALL, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **EQUITY: Appellate Practice.** In an equitable proceeding, where the record is incomplete and the evidence offered at the trial has not all been preserved, the appellate court will not consider the testimony.

2. ———: **Fraud: Refusal of Defendant to Testify.** Where grave charges of fraudulent conduct were made against the defendant in the statement of the plaintiff's cause of action, the failure of the defendant to testify on his own behalf and make explanation of incriminating testimony offered by the plaintiff, must be regarded as strong circumstances against him.

Appeal from Greene Circuit Court.—*Hon. J. T. Neville*, Judge.

AFFIRMED.

W. Cloud and *R. H. Davis* for appellant.

(1) Special findings bear the same relation to a judgment that a special verdict bears, and performs the same offices that a special verdict performs. 8 Ency. Pl. & Pr., p. 949; Blount v. Spratt, 113 Mo. l. c. 55; Nichols v. Carter, 49 Mo. App. l. c. 405; Bates v. Bower, 17 Mo. 550; Land Company v. Bretz, 125 Mo. l. c. 423. And they must contain a finding on every material controverted fact necessary to support the judgment. 22 Ency. Pl. & Pr., p. 984. And they should be taken most strongly against the party upon whom rests the burden of proof. 22 Ency. Pl. & Pr., p. 996. And a special verdict can not be aided by intendment. 52 Ency. Pl. & Pr., 997; Collins v. Riley, 104 U. S. 327; Vansyckel v. Stewart, 77 Pa. St. 124. (2) A special verdict must be responsive to the material issues of the pleadings

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in order to support, and if not responsive the judgment must fail. 22 Ency. Pl. & Pr., 986; Chicago, etc., R. Co. v. Burger, 124 Ind. 275; Stinnett v. Sherman, 43 S. W. Rep. 847; Stillman v. Gano, 39 S. W. Rep. 559.

Barbour & McDavid and *O. L. Cravens* for respondent.

(1) The failure of Hall to testify at the trial of this case raises a strong presumption in favor of the charges of fraud alleged against him and his failure to deny the truth of the testimony of Nelson, Cowley, Jones and Conner, or to present any evidence of his good faith, utterly destroys any possible inference that can be made that Hall is innocent of the charges against him stated in the petition and testified by plaintiff and his witnesses. His position in this court now concedes the truth of these charges. In fact he has never occupied any other position. Mabary v. McClurg, 74 Mo. 575; Baldwin v. Whitcomb, 71 Mo. 651; Fitzpatrick v. Weber, 168 Mo. 572. (2) In equity the plaintiff did not, as contended, simply attempt to get a lien, but he actually secured a lien on the parcels designated to be conveyed to him; and not a lien merely but his rights were such that he is regarded by the decisions of this court as he would be regarded by the decisions of other courts—in the light of a purchaser. The debtor is bound in conscience to correct the mistake. Rhodes v. Outcalt, 48 Mo. 367; Cited and approved: 66 Mo. 370, 81 Mo. 393; Townsend v. Vanderwerker, 160 U. S. 171, 40 L. Ed. 383; Potter v. McDowell, 43 Mo. 93; Logan v. Smith, 62 Mo. 455; Linnville v. Savage, 58 Mo. 248; 20 Am. and Eng. Ency. Law (2 Ed.), 1040; Loewen v. Forsee, 137 Mo. 29. (3) Equity will grant all relief necessary to render the remedy completely effective to compel the fraudulent party to make good his fraudulent misrepresentations. Pomeroy's Equity, secs. 303, 899, 910. And this includes treating him as a trustee

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with respect to the property he has acquired by his fraud. That where one who obtains money or property which does not equitably belong to him and which he can not in good conscience retain or withhold from another, who is beneficially entitled to it, a constructive trust arises. And this is so even though assumpsit may lie against the wrongdoer. Pomeroy's Equity, sec. 1047; Clark v. Bank, 57 Mo. App. 277.

REYBURN, J.—In the early part of the year 1900, appellant Hall, who owned a lumber yard in the city of Granby, while returning therefrom to Monett, where he was then living, encountered on the train his codefendant Conner, with whom he had been acquainted for several years, a carpenter by trade and also a resident of Monett. Hall then stated to Conner that his lumber yard was overstocked with high-priced lumber, and as a measure of relief he must put it in buildings, and he proposed to Conner the building of some houses at Monett, to which Conner replied, that he doubted whether they could be made profitable. Soon after this conversation, at instance of Hall, Conner negotiated the purchase of two lots, known as numbers seven and eight, in block number 23, of city of Monett; the purchase was conducted by Conner, the price paid for both, five hundred dollars, of which two hundred dollars were paid in cash, furnished by Hall, and delivered to Glassner, their owner; a warranty deed dated June 19, 1900, was taken from him to Conner as grantee. Conner in turn executed two deeds of trust of same date, June 20, 1900, to A. V. Darroch, trustee, each conveying one lot and purporting to secure ten notes of two hundred dollars each, all executed by Conner to order of Hall and payable respectively, one each year after date. Lumber was then shipped from the Granby Lumber yard for houses on both lots, and a dwelling completed on lot number seven, the corner lot; but the lumber piled on the other, the inner lot, number eight, was later disposed of and

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removed. Lot seven and house erected thereon were conveyed by Conner and wife to Mamie Hull by warranty deed, dated April 10, 1901, and a deed of trust taken back, conveying the property to Robert Johnson, as trustee of Hall, securing $1,985, evidenced by forty-four notes of forty-five and fifty dollars each, the first maturing May 21, 1901, and one due each third month thereafter. All these deeds were duly recorded. In July, 1900, plaintiff Nelson, manager of the Long-Bell Lumber Company, a creditor of Hall, and W. R. Cowley, its attorney, called on Hall, and pressed him for adjustment of an indebtedness to their concern, then exceeding three thousand dollars, upon which Hall at the time paid a small sum on account and closed by notes for the balance at sixty and ninety days, secured by collateral, a part of which later proved valueless, and a part consisting of notes secured by mortgage on lot number eight. This property was in plain view from Hall's residence, where the parties were gathered, and from which Hall pointed it out and described the lot conveyed as located on the corner of the second block north and on opposite side of the street. The representatives of the creditor lumber corporation, inspected the property and apparently satisfied, accepted Hall's notes above described, including those secured by mortgage on lot eight. The notes received for the balance of the debt were not met, and in October, following, Nelson again waited on Hall, found another creditor's representative also pressing Hall, and a settlement on behalf of all Hall's creditors was discussed and later a meeting of his creditors was held, a statement of his assets prepared by him, submitted to them and a trust deed made respondent Nelson, conveying the remaining stock at the lumber yard, sundry accounts, and certain notes, including the notes executed by Conner and secured by his deed of trust on lot number eight; the conveyance being in trust to Nelson as trustee for creditors of Hall, enumerated, with power in the trustee to reduce the

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trust property to cash, distribute its proceeds pro rata among the creditors listed, the grantor agreeing to pay them the balance of their respective debts, if any then remained unpaid, within five years from the date of the trust instrument. Throughout the negotiations with Hall by Nelson and other representatives of his creditors, the false impression was created, encouraged and tolerated that among the securities conveyed were the notes secured upon the corner lot with dwelling thereon, or to be built thereon; it was charged by the respondents, and the proof tended to establish, that Hall, as an inducement and consideration to the creditors to accept the trust agreement, fraudulently represented that the mortgage notes delivered were secured upon lot numbered seven upon which the dwelling had been or was to be erected, and not upon lot numbered eight which remained unimproved, but which was discovered to be the lot described in the deed of trust securing the notes delivered to the trustee of the creditors; whether any intention ever existed to improve also lot eight was controverted and doubtful.

This action was in nature of an equitable proceeding on behalf of the trustee in the deed of trust for the benefit of Hall's creditors, against the latter, his wife, Conner, Mamie Hull, the purchaser from Conner of lot seven, her husband, Robert Johnston, trustee in the mortgage, and another party (essential to be joined at inception of action but later no longer a necessary party) as defendants. The bill was voluminous and described at length the various transactions briefly summarized above, charged a fraudulent conspiracy between Hall, his wife and Conner to defraud creditors of the first named, averred fraudulent representations by Hall and Conner, that the notes tendered and later delivered to the trustee, respondent Nelson, were secured by first mortgage upon the unimproved lot (number eight), in lieu of upon the improved lot; that after the fraudulent substitution of the notes secured by

lot eight, Hall sold and caused to be conveyed lot seven with dwelling to the defendants Mamie and O. S. Hull, for a consideration expressed of twenty-five hundred dollars, but paid by notes for two thousand dollars in all, the amounts and maturities of which were described and secured by deed of trust to Robert Johnston, as trustee of Hall, and prayed judgment that the Conner notes held by respondent be declared a first lien on lot seven, for appointment of a receiver, for injunctive and general equitable relief. Defendant Hall, interposed for his defense, an answer containing a general denial, and admitting the execution of the trust deed which was embodied in full; and averring that respondent as trustee had proceeded to administer the trust therein created, but charged mismanagement in particulars detailed, and specifically averred that there was no equity in plaintiff's bill entitling him to relief, and concluded with prayer for removal of Nelson from the trusteeship, and an accounting by him as trustee.

The answer of Mary M. Hall, wife of the principal defendant, was a general denial. The defendants, Mamie and O. S. Hull, pleaded also a general denial coupled with allegations of payment of part of the notes described by plaintiff. The separate answer of Conner, after a general denial, acknowledged the execution of the notes mentioned in plaintiff's complaint, and their delivery to plaintiff, but averred that the notes were without consideration, the consideration having failed, and that plaintiff was not an innocent purchaser for value, and closed with a prayer for their cancellation. After trial, and prior to decision of the cause, defendant Conner and wife filed an amended answer, admitting the execution of the notes and deed of trust described as conveying lot number eight, and acknowledging their own insolvency.

The testimony introduced by plaintiff, as gathered from the abstracts submitted, consisted of the evidence

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of Nelson, of one Jones, a representative and officer of one of the creditors named in the deed of trust, the attorney of the Long-Bell Lumber Company, all of whom participated at various stages, in the negotiations with Hall preliminary to the execution and acceptance by his creditors of the deed of trust; and the evidence of Conner, together with documentary proof embracing the various conveyances, deeds, mortgages and mortgage notes involved in the transactions mentioned. The defendant Hall refrained from tendering any testimony in his own defense, but contented himself at close of plaintiffs' case by submitting a motion to dismiss plaintiffs' bill, as stating no facts sufficient to constitute a cause of action and because the evidence did not warrant a judgment; this the court overruled, but granted the application for a special finding and found the following:

"I find that Hall represented to plaintiff that he would give him the notes that were secured by deed of trust on the lot on which the house was located, and that he intentionally deceived Nelson and gave him the notes secured by mortgage on lot eight, which was practically valueless. That plaintiff and the creditors he represented were defrauded and deceived and that they thought and understood they were getting the security of the lot seven and the dwelling thereon.

"Defendant Hull bought after this suit was brought and has given 44 notes, 43 of which were for $45 and one for $50; seven notes have been paid up to this time and $30 on the 8th.

"I order Hall to turn over and give to plaintiff the remaining notes for the purpose of executing his trust and order plaintiff to deliver back the Conner notes which is done here in court."

A decree in favor of complainant was entered in accordance with such finding, from which defendants have appealed.

As is apparent from the preceding statement, this cause is not presented to this court by appellants for

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its review, in as lucid and intelligible a shape as might be desired. The facts out of which the controversy emanated are at best complex, the pleadings involved and the record is not complete, as all the evidence offered at the trial has not been preserved, and the well-recognized rule of appellate practice governing equitable proceedings prohibits the consideration of the testimony. Heffernan v. Weir, 72 S. W. Rep. 1085. But the abstracts of the testimony and briefs of counsel have been carefully and diligently considered, and we can not adopt the view urged by appellants, that the complaint contains no equity and respondent was not entitled to equitable relief under the evidence adduced. The fact that Hall, against whom such grave charges of fraudulent conduct were made in respondents' statement of his cause of action, did not appear and testify in his own behalf and failed to deny under oath, or make any effort to afford an explanation of the incriminating testimony offered on behalf of respondents, can not but be regarded as strong circumstances against him, awakening suspicions, and justifying most serious and adverse conclusions and presumptions. Mabray v. McClurg, 74 Mo. 575; Baldwin v. Whitcomb, 71 Mo. 651. The apology for his continuing mute under the severe arraignment of this action, advanced by his counsel at the oral argument, that criminal proceedings were pending against him, can not be accepted as satisfactory. The petition herein was replete with charges of fraud, which were found sustained by the trial court from the evidence, and in the state of the record, we are not justified in disturbing this finding.

The judgment is, therefore, affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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NELSON MANUFACTURING COMPANY, Respondent. v. SHREVE, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **EVIDENCE: Letterpress Copies of Correspondence.** Where it has been shown that original letters were neither within the control of either party nor within the jurisdiction of the court, and reasonable efforts have been exhausted to procure them, duly identified letterpress copies of the originals are admissible in evidence.

2. ———: **Proof of Insolvency.** Where the issue of insolvency was before the court, an estimate of the value of the property of the alleged insolvent, made by one who disclaimed accurate knowledge of its value, was admissible for what it was worth.

3. **VERDICT: Interest not Calculated.** A verdict for a certain sum with interest from a given date, with the interest not calculated, is sufficient on motion in arrest; the judge, or the clerk under his direction, may supply the calculation.

Appeal from Pike Circuit Court.—*Hon David H. Eby*, Judge.

AFFIRMED.

James W. Reynolds for appellant.

(1) Exhibits "A" and "B" constitute the very foundation of plaintiff's case. That they are letterpress copies instead of originals, was shown by plaintiff's witness, Chambers' testimony. Such copies are inadmissible without laying foundation same as any other copies. Traber v. Hicks, 131 Mo. 180; Greenleaf on Ev., sec. 558; Strain v. Murphy, 45 Mo. 337; Abel v. Strimple, 31 Mo. App. 86; Christy v. Cavenaugh et al., 45 Mo. 375; Blondeau v. Sheridan, 81 Mo. 545. (2) If a non-resident witness whose deposition is taken (as was

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done here) refused to produce the desired document upon proper request or notice, then secondary evidence of its contents may be introduced. 1 Jones on Ev., sec. 217; Binney v. Russell, 109 Mass. 55; Fisher v. Green, 95 Ill. 94. But the undoubted weight of authority is that a letter shown to be in the hands of a third party who is beyond the jurisdiction of the court is secondary evidence and is inadmissible to prove its contents without a showing of a proper and unsuccessful effort to obtain the original. Kirchner v. McLaughlin, 28 Pac. 505. For a full discussion of all the authorities on the point see 45, Central Law Journal, pages 368 to 373. (3) The motion in arrest of judgment should have been sustained for the reason that the jury did not compute the interest which they found to be due as required by law. The calculation of the interest must be made by the jury. Dyer v. Combs, 65 Mo. App. 148; Poulson v. Collier, 18 Mo. App. 604; Ryors v. Pryor, 31 Mo. App. 555.

Tapley & Fitzgerrell for respondent.

Exhibits "A" and "B" were properly admitted. A notice to produce them was served on appellant, also subpoena *duces tecum,* and if in his possession it was his duty to produce them. And if they were in the possession of I. C. Shreve, they were beyond the jurisdiction of this court, as it was clearly shown that he was a non-resident at the time this suit was brought, and at all times during its pendency. This being shown, secondary evidence of them was properly admitted. Brown v. Wood, 19 Mo. 475; Harvey Lumber Co. v. Herriman & Curd L. Co., 39 Mo. App. 220; Brown v. Railroad, 69 Mo. App. 422; Burton v. Driggs, 20 Wall. (U. S.) 125.

REYBURN, J.—After reversal by this court, (94 Mo. App. 518) this case was retried upon amended pleadings and from judgment upon verdict for plaintiff,

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defendant has again brought the cause to this court. In June, 1899, appellant's son then engaged in business on his own account, in the city of Louisiana, called on his father at the latter's office with a letter of respondent, and stated it had demanded security before further shipments of goods and asked his father to write that he would be responsible for the particular bill discussed. Appellant, disclaiming that such offer on his part would be of any assistance, as he was unknown to respondent, at urgent request of his son, finally wrote a letter to respondent, hereafter reproduced. A few days later his son again called upon him at his office, and making a statement that he owed respondent for which he was required to furnish security before obtaining the goods, again asked his father to write a further letter to respondent and, repeating his doubt of acceptance of his guaranty, the father, asking amount of the son's indebtedness, to which the son, after consulting a letter from respondent, and either submitting it to appellant or repeating to him its contents, replied that the amount was $265, again wrote a letter to respondent, later exhibited in its order. Appellant denies receiving any reply to either letter, but subsequently by letter was notified of extent of son's indebtedness to respondent and its payment requested. The correspondence between the parties consisted of the following:

"St. Louis, Missouri, June 22, '99.

"I. C. Shreve, Esq.,

"Louisiana, Missouri.

"Dear Sir:

"We have your order of the 21st, inst., which will receive our prompt attention. By referring to your account we find that you owe us a balance on April account of $114.07, together with shipments made you during May and June, bringing the total amount up to date $265. You mentioned to the writer when you were in our office several days ago that Mr. C. D. Shreve had expressed his willingness to guarantee the payment of

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your account against you, and as it has now grown to be a right considerable amount, and we hope will be larger in the future, we would thank you to have him write us to that effect. Awaiting your reply, we are,

"Yours truly,

"N. O. NELSON MFG. COMPANY.

"Louisiana, Mo., 6-24, 1899.

"Messrs. N. O. Nelson Mfg. Co.,

"Saint Louis, Mo.

"Dear Sirs:

"You ship the Dr. Birkhead order sent you by my son and I will stand good to you for the payment of the same. You need not be afraid to ship him, in my judgment, anything he orders; for he is strictly honest; just started in business, a good mechanic and plenty of work and I believe he will forward your money just as fast as he collects it in.

"Yours very respectfully,

"C. D. SHREVE.

"St. Louis, Missouri, June 26, 1899.

"I. C. Shreve, Esq.,

"Louisiana, Mo.

"Dear Sir:

"We have your favor of the 23rd inst., also letter from your father on the 24th. It seems that either of you or he misunderstood our letter of the 22nd, as in his letter he stated that he will guarantee the payment of the order for Dr. Birkhead. We did not have in mind asking for a guarantee of this particular order, but simply a general guarantee of his, to cover your account for anything you might order.

"You mentioned when in the office recently, that your father was willing to guarantee payment of your account, and it was for this reason we wrote you that as your account was now gettting to be a pretty good-sized one, and hoping that you would continue to give us your orders, and probably run it up to a still larger amount;

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we thought we might as well ask for the guaranty. Please explain this to him and request him to write us that he will stand good for any and all orders you may place with us. Awaiting your reply, we are,

"Yours very truly,

"N. O. NELSON MFG. COMPANY.

"Louisiana, Missouri, June 28th, 1899.

"Messrs. N. O. Nelson Mfg. Co.,

"St. Louis, Mo.

"Dear Sirs:

"Your letter to my son is before me. In reply will say you let him have such amount of goods as he needs until further orders, and I will stand good to you for the same, also what he owes you at the present time.

"Yours very respectfully,

"C. D. SHREVE.

"St. Louis, January 19, 1900.

"C. D. Shreve, Esq.,

"Louisiana, Mo.

"Dear Sir:

"Your son owes us $512.59, which it seems we can not collect. The amount is long past due, and we have written him repeatedly asking for settlement, and being unsuccessful we must look to you to make good the guarantee which you gave us June 28th, 1899.

"It has not been our wish to call upon you, but we must realize from our outstanding accounts with a fair degree of promptness.

"We need considerable money next Monday, and if it is inconvenient for you to send us your check by return mail for the entire amount, we will accept your 30, 60, and 90 day notes, each for one-third of the total.

"Awaiting your reply, we are,

"Yours very truly,

"N. O. NELSON MFG. CO."

1. Appellant vigorously protests against the admission in evidence of the letters of respondent of dates

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June 22 and 26, 1899, both being those addressed to the son, as being received without sufficient foundation for their introduction in the shape of letterpress copies of the originals in lieu of the letters themselves. It appeared from the testimony that if extant they were in possession of the appellant's counsel or his son, their addressee; the latter who had become a non-resident, in testifying by deposition, identified the press-copies and stated that he did not have the originals, but thought they had been lost. Respondent further duly served on appellant a subpoena *duces tecum* for their production at the trial and his counsel assured the court he would produce them if in his possession. These copies were further identified by their writer, an employee of respondent, and as it has satisfactorily accounted for the non-production of the originals by showing they were neither within control of either party nor within the jurisdiction of the court, and has exhausted all reasonable efforts to produce them, under such circumstances the best evidence obtainable, the press duplicates were properly allowed in evidence. Brown v. Railroad, 69 Mo. App. 418; and cases cited. Appellant also insists that the first letter addressed to respondent by appellant, of date June 24, 1899, should have been excluded as incompetent and not connected with the issues. This letter was in response to the original letter to the son, requesting appellant's guaranty, and in turn invoked the reply to the son of June 26, and while appellant disavowed having seen either the preceding letter or this one, both to his son from respondent, the letter of appellant to respondent appears to have been in reply to the letter and it was competent and rightfully admitted.

2. Respondent's witness, Caldwell, after describing the contents of the son's plumbing shop hesitated about giving an opinion of their value from want of knowledge; but upon being urged to give an estimate, appraised them at about $150, and appellant submits the admission of this opinion was highly prejudicial; the

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issue of insolvency was prominent and sharply controverted, and the testimony was properly received to be accorded such weight as the jury deemed it merited.

3. The motion in arrest was especially directed toward the form of the verdict returned by the jury, thus: "We, the jury, find for the plaintiff in the sum of $369.08 with six per cent interest thereon from May 12, 1900." which is censured as being incomplete by reason of the non-computation of the interest accrued. A verdict in like form has been approved by this court, as valid and subject to the general rule, that that is sufficiently certain which can be made certain; it being held that the judge, or clerk at his direction, might supply the calculation of interest omitted.

The legal propositions involved in this controversy were fully reviewed upon its earlier determination and the law governing the controverted issues then clearly defined, and the retrial conducted in accordance with the expressions of this court. No reversible error has been pointed out in the present record and the judgment is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

MITCHELL, Respondent, v. BRANHAM, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **STATUTE OF FRAUDS: Performance on One Side.** An oral contract, which is not to be wholly performed within a year, is taken out of the statute of frauds when it is entirely performed on one side.

2. **LIQUOR SELLING: Public Policy.** Liquor selling is made a legitimate occupation, if the statutes are complied with, and contracts in relation thereto are not void as in contravention of public policy, but are enforceable as any other class of contracts.

3. **CONTRACTS: Restraint of Trade.** A contract, whereby a person agrees for a valuable consideration not to carry on a business in a designated locality for a definite length of time, is not a contract in restraint of trade, but binding upon the promisor.

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4. **SALES: Unlawful Business: Incidental Violation of Law.** Where the vendor of a saloon fixtures and good will, agreed as part of the consideration of the sale to abstain from the saloon business in that locality for a given time, the contract was not void because the sale included an assignment of the vendor's license and was followed by a continuance of the business by the vendee under the vendor's license until that expired, before taking out a license of his own, where it appears that there was no intention to violate the law; the contract was not necessarily void because its performance may have led incidentally to a violation of the law, if such violation was not its intention or necessary consequence.

5. **DRAMSHOPS: Contracts Concerning Illegal Business.** Unlicensed sales of liquor, and other contracts regarding intoxicating liquors, which contravene the provisions of the penal statutes, are obnoxious to the law, and a party to such a contract has no remedy for a breach of it.

6. **SALES: Dramshops: Contract by Vendor to Refrain From Business: Conducting Illegal Business.** In an action by the vendee of a saloon business against his vendor to recover damages caused by the latter's violation of his contract to refrain from engaging in the same business at the same place within a given time, the plaintiff can not recover for the loss of profits, caused by the defendant's breach of the contract, during the time the plaintiff was conducting his business without a license.

Appeal from New Madrid Circuit Court.—*Hon. H. C. Riley*, Judge.

REVERSED AND REMANDED.

Lawrence Fisher, *H. C. O'Bryan* and *Robert Rutledge* for appellant.

(1) The court erred in overruling the objections of the defendant to the introduction of any testimony because the petition of plaintiff failed to state a cause of action. The sale of intoxicating liquors is by law illegal, and where a contract conflicts with the law and morals of the time and contravenes an established interest of society, it is void as being against public policy. The petition on its face discloses the illegal and immoral nature

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of the contract, and that such contract, even had it been made, was or would have been void, and the petition did not state a cause of action, and defendant's objection should have been sustained. Turley v. Edwards, 18 Mo. App. 676; Austin v. State, 10 Mo. 591; Peltz v. Long, 40 Mo. 533; Sumner v. Sumner, 54 Mo. 340. (2) Plaintiff's petition did not state a cause of action, and this objection is never waived and is not cured even by a verdict and judgment. Brown v. Shrock, 27 Mo. App. 351. (3) If illegal transactions enter into and constitute a part of the contract they vitiate the whole contract, and there can be no recovery unless the illegal part can be separated from the other portion, or items of the contract, and under the pleadings and proof this instruction should not have been given. It is not supported by the petition. Pardridge v. Cutler, 104 Ill. App. 89; Bick v. Seal, 45 Mo. App. 475. (4) Under the three grounds set up in the petition the alleged contract was no part of the sale of the property, and clearly fell under the statute of frauds. R. S. 1899, sec. 3418; Attaway v. Bank, 93 Mo. 485; Harrison v. McCluney, 32 Mo. App. 481. (5) Both Mitchell and Brewer testified that Mitchell operated the saloon under the Branham license from September 17, 1901, to November 4, 1901, which was in violation of law, and even if Branham had made such contract, and aside from the contention that such contract could under any circumstances have been legal, and even if the Sul Thompson saloon was opened across the street on October 5, 1901, this instruction certainly declared the law and should have been given. R. S. 1899, sec. 2992; State v. Downing, 22 Mo. App. 504. (6) Branham could not contract to bargain and barter the appetites and morals of the citizens peculiar to that locality, and could not contract to promote the dramshop business of Mitchell that way. Austin v. State, 10 Mo. 591; State ex rel. Troll v. Hudson, 78 Mo. 302; State v. Hudson, 13 Mo. App. 61; Friend v. Porter, 50 Mo. App. 89. (7) It is an undis-

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puted principle that an action will not lie to recover damages if to do so the plaintiff relies upon or requires aid from an illegal or immoral transaction, or depends upon such a contract. Welch v. Wesson, 6 Gray 505.

J. V. Conran for respondent.

(1) No illegality appearing from the contract in this cause or from the evidence necessary to prove it but upon an extraneous fact. The defense was, new matter must have been pleaded in order to be available. St. Louis A. & M. Ass'n v. Delano, 108 Mo. 217; Munro v. Adler, 86 Mo. 445; School District v. Sheidley, 138 Mo. 690. (2) Appellant urges that the contract is in restraint of trade and opposed to public policy. It is now the rule that agreements in restriction of trade will be upheld when the restriction does not go beyond some particular locality, is founded on a sufficient consideration and is limited to time, place and person. Millinckrodt Chemical Works v. Nemich, 83 Mo. App. 6; Gordon v. Mansfield, 84 Mo. App. 367. (3) It is contended that respondent operated under the Branham license contrary to law and that that fact vitiates the contract. The Branham license was no part of the contract. A party seeking to recover on contract can not be defeated from recovery by reason of illegality in his former conduct when he can make out his cause independently of his illegal conduct. Roselle v. Beckman, 134 Mo. 380; Karum M. P. Co. v. Wayland, 81 Mo. App. 305.

GOODE, J.—In 1901 the appellant was conducting a saloon in the town of Portageville, in New Madrid county, but in September of that year he sold his building, saloon, fixtures and good-will to the respondent, and according to the testimony of the latter and other witnesses, agreed to abstain from the saloon business in that town for three years, and to use his influence to

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throw custom to the respondent. The consideration paid by Mitchell was upwards of $2,300 and there is much testimony to show that a good part of the price was intended to compensate the appellant for refraining from competing with the respondent. The trade was made on September 17, and the purchase money fully paid by Mitchell; yet on October 5, Branham engaged in the saloon business, as he does not deny, in the name of Sul Thompson that is to say, Branham furnished the money and got Thompson to take out a license; but there was proof that the business was Branham's. After the saloon had been conducted that way for six months, Branham petitioned for a license in his own name. This action is for damages and was brought on the agreement of Branham to keep out of the saloon business for three years and throw his influence in favor of Mitchell.

The evidence shows that at the time of the sale of Branham's saloon and fixtures to Mitchell, the former agreed to sign a written contract stipulating that he would refrain from competing with Mitchell for the period stated; but that after he had been paid his money, he refused to sign such an agreement.

The very great weight of the evidence supports Mitchell's version of the controversy, which, indeed, was not denied positively by Branham himself while on the witness stand.

Several defenses are relied on which will be taken up and disposed of consecutively. One is, that the agreement was not to be performed within a year, and not having been reduced to writing is, therefore, void. But it was entirely performed on the part of Mitchell, as the evidence shows, and his full performance suffices to take it out of the statute of frauds. Bless v. Jenkins, 129 Mo. 647.

It is said the sale of intoxicating liquors, or the dramshop business, is opposed to sound morals and public policy—is an occupation tolerated under restrictions and penalties by the law, but discouraged; and that,

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therefore, the contract between Mitchell and Branham, which furnishes the subject-matter of this action, is so obnoxious to the law that it will not be enforced by a court. The theory of this defense, as we understand it, is that Branham's contract to promote Mitchell's dramshop business tended to impair the morals of the community, and for that reason will be refused legal recognition. If the State was solicitous about the morals of the people and discouraged liquor selling, to the extent assumed, it would be a good answer to the argument of appellant's counsel that Branham bound himself to stay out of the saloon business; an agreement that tended to keep down the liquor traffic in the town of Portageville, and thereby subserve the interest of good morals. If saloons are of deleterious influence, the town, presumptively, would be better off with one than with two, and, therefore, Branham's contract with Mitchell was in line with public policy, if the policy of the State is as asserted by appellant. But running a dramshop is a legitimate occupation if the statutes of the State are complied with by the proprietor; and we have not before heard the doctrine advanced that contracts in relation to a licensed liquor traffic are void as in contravention of public policy. They are as enforceable as any other class of contracts. Of course, if an agreement was made in violation of the law, about this or any matter, it would be treated as a nullity; but the law does not prevent Mitchell from conducting a saloon in Portageville, or require Branham to conduct one, and the latter, therefore, infringed neither a statute nor a rule of State policy when he covenanted that he would not keep a saloon there.

The illegality of the agreement is pressed from another side, to-wit; from the premise that it was in restraint of trade and as such against public policy. There is no strength in this position; for a person may bind himself by a promise, for a valuable consideration, not to carry on a business in a designated locality, or within

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such reasonable limits as may be necessary to protect the promisee. Contracts against pursuing an avocation are not, legally speaking, in restraint of trade unless they are general in their nature; in which case they have been denounced as hampering a citizen in his means of obtaining a livelihood and promoting monopoly. But the agreement with which we are dealing was of local scope and perfectly valid by every decision known to us. We might aptly quote the remark of Judge SCOTT in dealing with a like point in Presbury v. Fisher & Bennett, 18 Mo. 50: "There is no practical man who would not smile at the conceit that the public welfare would sustain an injury by enforcing an obligation like that involved in the present case."

Without going into this propostition, which rests far beyond the reach of controversy, we will cite some apposite authorites for the reader to consult if he desires. Long v. Towl, 42 Mo. 545; Pelz v. Eichele, 62 Mo. 171; Wiggins Ferry Co. v. Railroad, 73 Mo. 389; Mallinckrodt Chem. Works v. Nemnich, 83 Mo. App. 6; Gordon v. Mansfield, 84 Mo. App. 367; Whitney v. Slayton, 40 Maine 224; Hoyt v. Holly, 39 Conn. 326; Haywood v. Young, 2 Chitty 407; Davis v. Mason, 5 T. R. 118; McClurg's appeal, 58 Pa. St. 51; Morse v. Morse, 103 Mass. 72; Leathercloth Co. v. Lorsont, L. R. 9 Eq. 395; Palmer v. Stebbins, 3 Pick. 188; and a case to which we call particular attention because it is so well considered, Kellogg v. Larkin, 56 Am. Dec. (Wis.) 164.

The contract in suit is said to have been nullified by the inclusion of an arrangement for the continuance, in disregard of the statutes, of the dramshop business by Mitchell under Branham's license until it expired. The evidence on this branch of the case consists of the statement of Mitchell on the witness stand that he continued the business under Branham's license from September 17th, when he took possession, to November 4th, when the license expired, and that the license was a part of his purchase. The law declares that the license of a

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dramshop keeper shall not be assignable nor transferable. R. S. 1899, sec. 2992. And if it is true Branham agreed to transfer his unexpired license to Mitchell as part of the consideration the latter was to get for the money he paid, that agreement was void and the attempted transfer a failure. There is nothing to show that either of the parties contemplated the continuance of the business under the name of Branham for the purpose of evading the statutes, nor that it was continued that way. On the contrary Mitchell took open charge of the business and ran it in his own name. Mitchell had just come from Tennessee to Missouri, and it is a fair inference that he supposed he could acquire Branham's license and continue the business under it for the period it had to run. Agreements to do acts in violation of a criminal statute, or whose purpose is to evade the law, are unenforceable. Bick v. Seal, 45 Mo. App. 475; Buck v. Albec, 26 Vt. 184; Upton v. Haines, 55 N. H. 283; Mayor v. Lacy, 3 Ala. 618; Billon v. Allen, 46 Iowa 299; Ritchie v. Smith, 6 C. B. 462; Pearce v. Brooks, L. R. 1 Eq. 213; McKinnell v. Robinson, 3 M. & W. 442. If these parties had stipulated for the conduct of the dramshop by Mitchell in Branham's name or under the latter's license, that part of their contract would undoubtedly have been void and, in that event, might or might not have been so interwoven with the remainder as to render it entirely void. Bick v. Seal, supra; Sullivan v. Hergan, 17 R. I. 109. This is a point which the facts, as we see them, do not call on us to decide. Concealment of the change of proprietors was neither contemplated nor attempted; nor is it in proof that they agreed a new license should not be obtained. The most that can be made of the facts is that Mitchell did not obtain a dramshop license until the expiration of the one current when he purchased, and which he supposed he had acquired. By virtue of the statute he failed to acquire it; but as the contract did not provide for a continuance of the business under that license,

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and as it was entirely possible and consistent with the contract for Mitchell to get a new license forthwith, the contract was not invalid as intending a breach of the law. A contract is not necessarily void because its performance may have led incidentally to a violation of the law, if that was not its intention or necessary consequence; that is to say, if it might have been performed consistently with its terms, in a legal mode. St. Louis Fair Assn. v. Carmody, 151 Mo. 566; Michael v. Bacon, 49 Mo. 474; Waugh v. Morris, L. R. 8 Q. B. 202.

Mitchell's failure to procure a license is sought to be taken advantage of in another way: It was admitted that the saloon was conducted from September 17 to November 4 under Branham's license, as Mitchell believed but, in point of law, without a license. Branham's competition opened October 5, and from that date to November 4 was against Mitchell as an unlicensed dramshop keeper. On these facts appellant's counsel requested an instruction which the court refused, that the respondent could not recover damages for an injury done to his business by appellant's competition during that interval. An instruction was given, over the objection of the appellant, that if the jury found the issues for the respondent, among other elements of damages, they should award whatever sum the evidence showed he had sustained from the falling off of sales from the date of the contract to the institution of this action—an instruction which authorized an award of damages for loss of profits during the period between October 5 and November 4, when respondent was without a license and was, of course, doing business in violation of law. We do not see how this ruling of the court can be upheld. Every sale that Mitchell made during that period was a criminal offense and it is a poor basis for damages that the sales made by a competitor meanwhile, prevented him from committing more offenses and realizing a profit by them. Our statutes provide that a dramshop keeper can not recover for any sale of liquor made on

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credit. R. S. 1899, sec. 2992. Without a statutory provision of that kind, a licensed dealer can recover. But the general rule of law is that unlicensed sales on credit, or other contracts regarding intoxicating liquors which contravene the provisions of penal statutes, are obnoxious to the law and that a party to such a contract has no remedy for a breach of it. Miller v. Ammon, 145 U. S. 421; Brewing Co. v. Whipple, 89 N. W. 751; Brewing Assn. v. Mason, 44 Minn. 318; Graves v. Johnson, 156 Mass. 211, 15 L. R. A. 834, and notes; Brewing Co. v. DeFrance, 91 Iowa 108; Storz v. Ginkelstein, 46 Neb. 577. Acts opposed to penal statutes and the public weal and policy are generally noticed with reference to their effect on contract obligations; but we are now considering Mitchell's conduct in keeping an unlicensed dramshop, to ascertain whether it affected his right to recover for the loss he suffered from Branham's competition while he was without a license. We have already ruled that the contract neither contemplated nor required a violation of the law, and hence was valid, even if it attempted to transfer the license. Granting that it was valid, the question left is, can Mitchell recover the loss of profits caused by Branham's breach during the time he (Mitchell) was selling intoxicants in violation of a criminal statute? It may be said that Mitchell's unlawful acts were matters between him and the State with which Branham had nothing to do, and that Branham ought not to escape payment of any loss he entailed on Mitchell by disregarding the agreement not to compete. The precise point is one on which the books are barren of authority so far as our research has disclosed; but we can not escape the conviction that, as Mitchell committed a criminal offense every time he sold liquor without a license, he ought not to be compensated for the profit he lost by Branham's preventing him from making other sales; that is, from committing other offenses. The rule of law which we deem applicable to the facts is, as stated by Lord Mansfield, that "No court will lend

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its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise '*ex turpi causa,*' or from the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." Holman v. Johnson, Cowp. 343. This principle is generally deferred to when the facts are appropriate, and enjoys the sanction of the appellate courts of this State, as it probably does of all tribunals that have had occasion to consider it. Peary v. Colvert, 22 Mo. 361; Parsons v. Randolph, 21 Mo. App. 353; Harrison v. McCluney, 32 Id. 481; Gregg v. Wyman, 4 Cush. 322; Woodman v. Hubbard, 25 N. H. 67; Welch v. Wesson, 6 Gray 505; Cranson v. Goss, 107 Mass. 439. It is adhered to both in actions of tort and of contract. There is a class of cases where the rule was held not to control the decision for a reason that, perhaps, may be sometimes more sensibly felt than it can be exactly enunciated; and the opinions in some of the cases just cited, while recognizing the general principle declared by Lord MANSFIELD, and frequently restating it in his language, have treated it as inapplicable to the facts before the court. Other decisions of that character are Waugh v. Morris, supra; Rogers v. Rogers, 171 Mass. 546; Favor v. Philbrick, 7 N. H. 326; Wood v. Railway Co., 72 N. Y. 196; Dowley v. Schiffer, 13 N. Y. Supp. 552.

In Fox v. Rogers, the defense preferred to a suit for building a drain into the defendant's house, was that the work was done in contravention of a statute and in excess of the plaintiff's license. This defense was overruled.

A like decision was given in Dowley v. Schiffer, an action on a contract to furnish electric lighting to the defendant's house, and to equip it with wires. Payment was resisted on the ground that overhead wires were

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used to connect the premises with the main line and that such wires were prohibited by statute.

Perhaps the principle that divides the two classes of cases will be stated with sufficient precision for practical purposes, by saying that when the substance of a plaintiff's cause of action, whether it sounds in contract or in tort, is the performance of some unlawful act, which must be established as a ground of recovery, a court will decline to relieve him; but that redress will be granted, notwithstanding his commission of an unlawful act, if that act is not of the essence of his case.

In Dowley v. Schiffer, the law was stated thus:

"The use of unlawful means by one of the parties in performing his obligation under a contract may prevent a recovery to which performance is essential; since in that case the party seeking to recover will himself be compelled to assert his own unlawful act; and he can not successfully invoke the intervention of courts of justice to aid him in securing the profits of his transgression. In such a case the legal interdiction upon the act constituting the performance operates as a disability, and the party seeking to recover can not assert such performance in support of his claim for compensation."

It was treated by the Supreme Court of Massachusetts in Gregg v. Wyman, as follows:

"A party can not be heard to allege his own unlawful act, and if such act be one of a series of facts necessary to support the plaintiff's claim, then that claim must fail.

"The party who seeks redress in a court of justice must come with clean hands; an action which requires for its support the aid of an illegal act can not be maintained. No action, therefore, can be maintained on an illegal contract, or upon anything growing out of it. Whether a claim connected with an illegal transaction, can be maintained in a court of law, may be determined by the test whether the plaintiff must bring in the illegal transaction to aid him in making out his case."

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If the matter in hand is regarded in the light of the foregoing statements of the law, it is apparent that the respondent has no standing to recover for the loss caused to his unlawful business by the appellant's competition during the month from October 5 to November 4. The essence of his demand for that time consists in the fact that he was prevented from perpetrating many misdemeanors—that is, making as many sales of liquor as, but for the appellant's breach of contract, he would have made. This is a very different complaint from what one would be for the destruction or the conversion of respondent's property; which no one could do with impunity, albeit respondent was disobeying the law; a distinction that was well drawn in Farmers, etc. Bank v. Railroad Co., 72 N. Y. 188. The cases of Fox v. Rogers and Dowley v. Schiffer, were of a similar nature—attempts to appropriate or convert the property and services of the respective plaintiffs because they had broken the law. But Branham did nothing like that; while on the other hand, Mitchell is asking for relief, not exactly for offenses committed by him, but for others he was prevented from committing, and which, if he had been let alone he would have committed, to his profit. We can not entertain such a claim, but hold that the court should have given an instruction that the jury could not award damages for loss sustained by the respondent while he was doing business without a license.

An objection was made to the sufficiency of the petition; but the reasons for that objection have been examined in discussing the points we have treated.

On another trial of this case the circuit court should be sure to give a clearly worded instruction that it devolves on the respondent to make out his case by a preponderance of the testimony. The jury were not satisfactorily instructed on that proposition at the trial.

The judgment is reversed and the cause remanded.
Bland, P. J., and *Reyburn, J.*, concur.

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JOHNSON, Respondent, v. BRISCOE, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **HUSBAND AND WIFE: Necessaries: Authority of Wife to Bind Husband.** Where a husband and wife are living together contentedly and he is providing for the wants and comforts of his family including herself, without complaint from them, the power of the wife to pledge her husband's credit for any article purchased must rest upon an agency either express or implied.

2. ——: ——: ——. Where the husband was a farmer of moderate circumstances and provided, so far as it appears, for the necessaries of his family, without complaint, in an action for the price of a gold watch purchased by his wife, the question of his liability should be determined, not on the question of the necessity of the article purchased, but of the wife's agency in making the purchase. The necessity of the article bought, the means of the parties, their condition in life, the previous conduct of the husband with reference to the wife's purchases, all enter into the inquiry as bearing on the measure of authority, and the case should be submitted to the jury on such evidence to say whether the wife acted within the scope of her ostensible or actual agency when she bought the watch.

3. ——: ——: ——: **Evidence.** The testimony of a neighbor, that his daughters wore watches, was incompetent.

4. ——: ——: ——: ——. Nor was it competent to show that the defendant's wife milked the cows or did other work about the farm.

Appeal from Lewis Circuit Court.—*Hon. E. R. McKee*, Judge.

Reversed and remanded.

Richard J. McNally and *Blair, Marchand & Rouse*, for appellant.

(1) The court erred in overruling defendant's motion to exclude the testimony of witness, Mr. Brown, in re-cross examination, as to the milking of the cows and

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the work that Mrs. Briscoe may have done and performed around the house; and asked to be stricken out because incompetent, irrelevant and immaterial. The court erred in giving instruction "A" on its own motion, because it does not correctly declare the law. The husband, and not the neighbors, controls and adopts his manner and style of living. Santer and Adams v. Scrutchfield, 28 Mo. App. 150; Raynes v. Bennett, 114 Mass. 424; Droege v. Droege, 52 Mo. App. 84. (2) The undisputed evidence shows that the defendant was a farmer in very moderate circumstances, involved in debt—a mortgage of a thousand dollars on the homestead as well as $300 other debts—unusually plain and retiring in his style and manner of living; that he and his wife visited very little and entertained less; that he worked hard on his farm, doing practically all his farm work alone; that his wife "had not a dollar" when they were married; that plaintiff knew, at the time of the sale of the watch to defendant's wife, defendant's circumstances, his rank, station in life, social position and manner of living. The peremptory instructions, therefore, should have been given. Harding v. Hyman, 54 Ill. 434; 9 Am. & Eng. Ency. of Law (1 Ed.), 831; Peters v. Fleming, 6 Mees & Welsby 42; Bevier v. Galloway, 71 Ill. 517.

Clay & Johnson for respondent.

(1) The appellant's assignment of error No. 2, is not well taken. It was proper matter to go to the jury tending to show that the purchase of the watch by defendant's wife was reasonable for the wife of one circumstanced, situated and surrounded as defendant's wife was, and was necessary and proper to equal her in adornment to her neighbors. Sauter & Adams v. Scrutchfield, 28 Mo. App. 150; Schouler's Domestic Relations (4 Ed.), sec. 61, pp. 61, 62 and 63. (2) The court did not err in giving instruction "A" on its own motion.

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The instruction correctly declares the law. Barr et al. v. Armstrong, 56 Mo. 577-589. (3) The wife's necessaries are such articles as the law deems essential to her health and comfort; they are determined, both in kind and amount, by the means and social position of the husband and wife, and must therefore vary greatly among different grades and at different stages of society. So necessaries today are not what they were fifty years ago. 1 Addison on Contracts, sec. 173, pp. 267, 268, 269, Morgan's Edition; Miller v. Brown, 47 Mo. 504. (4) The law expects from the husband some exercise of his marital control; therefore, when a husband living with his wife, sees her attired in costly dresses and indulging in expensive ornaments, and fails to manifest his disapprobation, and does not return them or cause them to be returned, he adopts his wife's act and renders himself answerable.

GOODE, J.—This controversy is over the purchase price of a gold watch which was bought by the defendant's wife from the plaintiff, a dealer in general merchandise in the town of Argola, in Lewis county. A long account, ranging over a year or two and made up of items of merchandise purchased and payments made by the defendant, was filed. The defendant paid for all the items of the bill except the watch. He refused to pay for that, asserting that it was bought by his wife and without authority.

The defendant is a farmer in moderate circumstances; worth four or five thousand dollars. He had been married sixteen years when this litigation arose and had two daughters. So far as the evidence discloses he and his wife got along without trouble; his provision for his family of food, clothing, comforts and conveniences was like that of other farmers of the vicinity and suitable to his estate and social degree. As we gather, the defendant and his family are people of average means and station, of respectable conduct and enjoy the esteem of

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their neighbors. Briscoe had been dealing with Johnson for several years and Mrs. Briscoe was in the habit of buying household supplies, clothing and such other articles as the family needed, on her husband's credit; all of which he had paid for without complaint until the watch was bought. There was no testimony to show that Mrs. Briscoe's purchases had included, previously, jewelry or other articles of an ornamental kind. A farmer who lived near the defendant's home was permitted to testify, against the objection of the defendant, that his daughters carried watches. A great deal of testimony was introduced to show the circumstances of the defendant and the station in life occupied by his family, the purport of which has been stated above.

Under the instructions given to them the jury returned a verdict for the plaintiff and the defendant appealed.

This instruction will illustrate the rule for ascertaining the defendant's responsibility, given to the jury:

"If you find from the greater weight of the evidence that the watch purchased by defendant's wife of plaintiff, and charged to defendant, was necessary and proper to equal her in adornment to her neighbors or the women generally of her neighborhood of her condition and standing in life and society, then it would be a necessity in the meaning of the law and your verdict should be for the plaintiff, otherwise it should be for the defendant. The question is not what defendant would consider necessary and would willingly provide. The question is under all the circumstances and surroundings, and associations, was the purchase reasonable for the wife of one circumstanced, situated and surrounded as defendant had surrounded, circumstanced and placed his wife; was it reasonably necessary for her comfort and pleasure, under the style or mode of life adopted and chosen by her husband."

It is impossible to collect from the books a theory of the husband's liability in cases like this and a rule

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of decision applicable under all circumstances. The power of a wife to pledge her husband's credit is rested sometimes on his legal obligation, arising from the conjugal relation, to provide her with necessaries. Sauter v. Scrutchfield, 28 Mo. App. 150; Cunningham v. Reardon, 98 Mass. 538; Raynes v. Bennett, 114 Mass. 424; Arnold v. Allen, 9 Daly 198; Cromwell v. Benjamin, 41 Barb. 558; Reeve, Domestic Relation (4 Ed.), 114. In other cases the courts have preferred to found the wife's power on an agency, express, implied or presumed, by virtue of which she may bind the husband to pay for articles she buys on his credit. Jolly v. Rees, 15 C. B. 628; Montague v. Benedict, 3 B. & C. 631; Debenham v. Mellon, 6 App. Cases 24; Lane v. Ironmonger, 13 M. & W. 368; Seaton v. Benedict, 5 Bing. 28; Reid v. Teakle, L. R. 13 C. B. 627; Atkins v. Curwood, 7 C. & P. 756; Freestone v. Butcher, 9 Car. & P. 643; Harshaw v. Merryman, 18 Mo. 106; Reese v. Chilton, 26 Mo. 598; Shelton v. Hoadley, 15 Conn. 535; Shelton v. Pendleton, 18 Conn. 417; Fredd v. Eves, 4 Harr. 385; Sawyer v. Cutting, 23 Vt. 486; Compton v. Bates, 10 Ill. App. 78. Each theory appears to be properly applied to cases presenting facts of a certain character and to be inapplicable under other circumstances. If a husband refuses to provide for a wife, casts her off or notifies merchants not to sell her goods on his credit, she may, nevertheless, supply herself with necessaries at his expense; but she can not be said to do so as his agent or by his authority except as a legal fiction. But if the two are living together in the family relation, she may possess either actual or ostensible authority to make purchases in his name, and to the extent she has such apparent or real authority he will be bound by the contracts she makes. Obviously, the instance of a wife dwelling apart from her husband, or of one living with a husband who refuses to support her, and the instance of a wife and husband living amicably and co-operating in the

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transaction of family affairs, present situations entirely unlike and call, therefore, for the use of different principles of law to determine whether and how far the husband's credit may be pledged by the wife. Take this case: The defendant and his wife were dwelling together contentedly, so far as appears, and he was providing for the wants and comfort of his family, including herself, to their satisfaction, or, at least without complaint. There was no proof that she had ever asked him to get her a watch, or that he was unwilling to get her one. There may be a good reason why, at a particular time, it is inexpedient for a man to purchase such an article, useful but not indispensable, though he may be perfectly willing to purchase it when his affairs permit. He certainly ought to have something to say about what debts he will incur, if he is providing for his family according to his means. Nor is it conclusive of his duty that wives of persons of his fortune and station have watches. That fact by no means determines that he has been so remiss in not providing one for his wife that she may get it on his credit, as a thing of necessity. The case is very different when a man's neglect is a source of distress to his wife, whether she has been abandoned or is living with him. With facts like those we have before us, we think the power of a wife to pledge her husband's credit must rest on an agency, either express or implied. Everything Mrs. Briscoe bought from the defendant was sold to her on the assumption, not that she was unsuitably provided for, or was suffering; but as one having authority to pledge her husband's credit for such articles as she was accustomed to buy. The better decisions declare the law to be that when husband and wife are living together, with the family relation undisturbed, and he is making such provision as excites no comment among their friends and no complaint from her, the question of her right to pledge his credit for any purchase, depends on her actual or ostensible authority, and is to be determined by the rules of the law

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of agency. This was the conclusion of very eminent judges in dealing with the subject in cases similar to this one and of recent date, and in which the decisions were reviewed for the purpose of settling the law for the realm of England. Debenham v. Mellon, 6 App. Cases 24; Jolly v. Rees, 15 C. B. 629. It was said in the Debenham case that the adjudications will be found to agree if negligible dicta in the opinions are overlooked; and we have found that most of the American decisions lay down the rule adopted by the English courts. This doctrine is the more expedient, inasmuch as nowadays wives are usually given wide liberty to supply themselves with what they need and there is not much disagreement or litigation over such matters.

The remaining question is, were there facts sufficient to raise an inference in fair minds that Mrs. Briscoe had authority to buy the watch on the defendant's credit, or such an appearance of it as justified the plaintiff in assuming that she had? In the absence of notice to the contrary, the law will imply authority on the part of a wife who is living with her husband, to buy such articles on his credit as pertain to the household arrangements, which are commonly under a wife's care. Ruddock v. Marsh, 1 H. & N. 601; Montague v. Benedict, supra. Or, as has been said, she is presumed to have all the usual authorities of a wife (Johnston v. Sumner, 3 H. & N. 261) or to have authority to purchase necessaries on the husband's credit as his agent (Harshaw v. Merryman, 18 Mo. 106). Such presumptions are not conclusive, but are really inferences of fact; for the husband may prove he made suitable provision for or furnished a reasonable allowance of money to his wife, and this will disprove her authority to bind him; certainly if the plaintiff sold her with knowledge of the facts and perhaps if he was ignorant of them. Jolly v. Rees, Debenham v. Mellon, supra. When the parties are maintaining conjugal relations, the necessity of the wife's purchase may be a material circumstance to prove

her authority. The cases seem to take into account the fortune and social standing of the parties for the same purpose; that is, as tending to prove an authority in the wife, actual or ostensible, to buy the article in dispute on the husband's credit. The ambiguity of the law flows from the uncertain and fluctuating meaning of the word "necessaries." As to necessaries in the sense of the old cases, that is, food, clothing, shelter, medical attendance and such things as every one must have, there can never be a question of a wife's right to provide them if her husband does not. The law holds that, among the various obligations a man may be under, the primary one is to support his family. Hence, our homestead and exemption statutes. And whether a woman is treated by legal fiction or by an inference from the facts, as an agent in the matter, or is regarded as exercising a prerogative attached by the law to the status of wife, is for practical purposes immaterial when the suit is for absolute necessaries sold to her; though the agency notion is then theoretically unsound; for such indispensable things may be furnished at the husband's cost notwithstanding a notice from him not to furnish her. But when necessaries are taken to mean not only articles of strict necessity, but those needed to equalize the wife in comfort to other women of her condition, an element of uncertainty is introduced. For when is a man bound to provide such things and who shall judge if he was delinquent? Shall he, his wife, a merchant, or a jury decide the matter? If the question is remitted in every instance to a jury, to say that the husband is or is not bound, accordingly as they may deem the articles purchased to be necessary or the reverse, a privilege of no defined limits to use her husband's credit will be accorded to the wife and his financial affairs largely taken from his control. The sounder doctrine is that the husband's responsibility does not stand on the question of necessity in a case like this; but, as said, on the wife's agency. The necessity of the article bought, the means

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of the parties, their condition in life, and the previous conduct of the husband with reference to the wife's purchases in his name, all enter into the inquiry as circumstances bearing on the measure of authority she has received or appears to have received from him. We hold this case should be referred to the jury on such evidence, to say whether Mrs. Briscoe acted within the scope of her ostensible or actual agency when she bought the watch. The instructions given at the trial went further than this rule and made the defendant answerable if the watch was needed to adorn the defendant's wife like her neighbors and women in the same social sphere.

The evidence as to the daughters of a witness wearing watches was incompetent, as not bearing on the issue and apt to mislead the jury. Raynes v. Bennett, 114 Mass. 424; Compton v. Bates, 10 Ill. App. 78. Neither was the testimony as to defendant's wife milking cows and doing other work about the farm competent.

There is some evidence in this record from which the inference might be drawn that the watch was sold on the credit of Mrs. Briscoe; for one witness swore Johnson said he knew he would get the money; that she was in the habit of paying her bills and of borrowing money to do so. Of course, if the sale was made on her credit and not on that of her husband, she alone is responsible for the price.

The judgment is reversed and the cause remanded for a trial in accordance with this opinion. *Bland, P. J.*, and *Reyburn, J.*, concur.

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CARP, Respondent, v. QUEEN INSURANCE COMPANY OF AMERICA, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **INSURANCE: Arbitration of Loss: Waiver.** A denial by an insurance company of any liability for a loss dispenses with a term of the policy requiring an appraisement of the amount of the loss.

2. ———: ———: **Pleading Non-Liability no Waiver.** But when suit is brought by the insured for damages sustained on account of a loss, a denial of liability in the company's answer, which pleads incendiarism or other act of insured sufficient to annul the policy, does not waive the defense of no appraisement, where that is also pleaded.

3. ———: ———: **Answer in Former Suit.** And an answer thus denying liability, filed in a former suit, on the same cause of action, which was dismissed, was improperly received in evidence to show waiver of appraisement.

4. ———: ———: **Preventing Appraisement by Insured.** Where an insurance policy provides for an appraisement, if the insured, or his chosen appraiser, acts in bad faith and prevents an appraisement, by postponing indefinitely the choice of an umpire, or otherwise, the fact will be a defense to any suit he may bring for the loss.

5. ———: ———: **Preventing Appraisement by the Insurer.** And where the insurer does not in good faith carry out an agreement to arbitrate the amount of the loss, but endeavors to utilize the agreement to obtain delay, it can not demand an appraisal as a condition precedent to the insured's right to sue.

6. ———: ———: **Misbehavior of Appraiser Imputed to Party Choosing Him.** The unfair behavior of an appraiser may be taken into account against the party that appointed him, in fixing the blame for the failure to execute an appraisal agreement.

7. ———: ———: **Preventing Appraisal by Both Parties.** If both parties to an insurance contract, endeavor to prevent an appraisal, the appraisement clause of the contract will cease to be a condition precedent to a right of action for the loss.

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8. ———: ———: **Honest but Futile Effort by Appraisers.** An honest, but futile effort by the appraisers, to arbitrate, unless it causes too protracted and wholly unreasonable delay, will not dispense with the need of appraisal.

9. **EVIDENCE: Documents: Issue of Fact.** The rule of law that courts must determine the meaning of documentary evidence has no relevancy when the dispute is not as to be the legal meaning of documents, but as to their tendency to prove one side or the other of an issue of fact, and different inferences may be fairly drawn from them as to what the truth was.

10. **INSURANCE: Arbitration: Disagreement as to Amount of Loss.** The insured, who has agreed to submit the ascertainment of a loss to arbitration can not afterwards be heard to say that the arbitration clause in his policy is inoperative because there is no dispute as to the amount of the loss.

11. ———: ———: **Withdrawing From Arbitration Agreement.** The insured can not withdraw from an agreement to arbitrate, where the policy simply provides for an appraisal of the amount of damages sustained and the arbitration is not intended to cover the whole question of liability.

12. **PRACTICE: Cross-Examination of Witness.** It is competent, in cross-examining a witness, to ask whether he has borne alias names, for the purpose of affecting his credibility.

Appeal from Lawrence Circuit Court.—*Hon. H. C. Pepper,* Judge.

REVERSED AND REMANDED.

Edward J. White and *Barger & Hicks* for appellant.

(1) The determination of the amount of the loss or damage by agreement of the parties or by award of appraisers was, under the policy sued on, a condition precedent to the maturity of the claim and to the right of the plaintiff to sue thereon. Murphy v. North British, etc., Ins. Co., 61 Mo. App. 323; McNees v. Ins. Co., 61 Mo. App. 335; Ostrander on Insurance, sec. 257; 4 Joyce on Insurance, sec. 3231 *et seq.*; Woods on Fire Insurance (2 Ed.), p. 1013; May on Insurance (3 Ed.), sec. 493; Scott v. Avery, 8 Exch. 487; Tredwin v. Hol-

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man, 1 H. & C. 72; Elliott v. Royal Exchange Assurance Co., L. R., 2 Exch. 245; Hamilton v. Ins. Co., 136 U. S. 242, 19 Ins. Law Jour. 865; U. S. v. Robeson, 9 Peters 319; Trott v. Ins. Co., 1 Clif. 439; Perkins v. U. S. Elec. Light Co., 16 Fed. 513; Gauche v. Ins. Co., 10 Fed. 347, 11 Ins. Law Jour. 361; Kanochea v. Railroad, 34 Fed. 471; Crossley v. Ins. Co., 27 Fed. 30; Yeomans v. Ins. Co. (U. S. C. C., New Jersey), 5 Ins. Law Jour. 858; Kahnweiler v. Ins. Co., 57 Fed. 562; Hamilton v. Ins. Co., 137 U. S. 370, 20 Ins. Law. Jour. 97; Mutual Fire Ins. Co. v. Alward, 61 Fed. 751; Fox v. Railroad, 3 Wallace, J. R. 243; Ins. Co. v. Young, 86 Ala. 425; Old Sauceleto Land & Dry Stock Co. v. Ins. Co., 66 Cal. 253; Adams v. Ins. Co. (Cal.), 11 Pacific 672; Hall v. Ins. Co., 57 Conn. 105, 18 Ins. Law Jour. 518; Carroll v. Ins. Co. (Cal.), 16 Ins. Law Jour. 764; Denver, etc., Con. Co. v. Stout, 8 Colo. 61; Adams v. Ins. Co., 70 Cal. 198; Campbell v. Ins. Co., 1 McArthur (D. C. 250; Ins. Co. v. Lewis (Fla.); 10 Southern 297; Ins. Co. v. Creighton, 51 Ga. 95; Ins. Co. v. Stocks, 149 Ill. 319; Ins. Co. v. Bishop, 154 Ill. 1; Ins. Co. v. Pulver, 126 Ill. 329; Zalesky v. Ins. Co., 102 Iowa 613, 27 Ins. Law Jour. 517; Ins. Co. v. Stiger, 109 Ill. 254; Gere v. Ins. Co., 67 Iowa 272, 23 N. W. 136; Berry v. Carter, 19 Kan. 135; Ins. Co. v. Caze, 14 Ky. Law 810; Reed v. Ins. Co., 136 Mass. 572, 14 Ins. Law Jour. 465; Hutchinson v. Ins. Co. (Mass.), 26 N. E. 439; Gassner v. Ins. Co., 42 Minn. 315, 44 N. W. 252, 19 I. L. J. 243; Chippewa Lum. Co. v. Ins. Co. (Mich.), 44 N. W. 1055, 19 Ins. Law Jour. 535; Ins. Co. v. Traub (Md.), 83 Md. 524, 35 Atl. 13, 25 Ins. Law Jour. 791; Allegre v. Ins. Co., 6 Har. & J. (Md.) 408; Mosnes v. Ins. Co., 50 Minn. 341, 52 N. W. 932; Randall v. Ins. Co., 10 Mon. 340, 20 Ins. Law Jour. 596; Ins. Co. v. Wild, 8 Neb. 427; Ins. Co. v. Wolf, 50 N. J. L. 453, 14 Atl. 561; Herndon v. Ins. Co., 107 N. Car. 183, 12 S. E. 126; Pioneer Mfg. Co. v. Assur. Co., 106 N. Car. 28; Ins. Co. v. Putnam, 20 Neb. 331, 30 N. W. 246; Ins. Co. v. Carnahan (Ohio, J.

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1900), 58 N. E. 805; Mentz v. Ins. Co., 79 Pa. St. 478; Ins. Co. v. Clancy, 71 Tex. 5, 10 Ins. Law Jour. 68, 8 S. W. 630; Chapman v. Ins. Co., 89 Wis. 572, 61 N. W. 422. (2) No evidence was introduced showing an agreement of parties or an award of appraisers fixing the amount of the loss, nor was any evidence offered tending to show a waiver thereof. On the contrary, the evidence shows the parties entered into contract after the loss to appraise the amount thereof. The court, therefore, erred in refusing to direct a verdict for defendant as requested. (3) The pleading of a defense in bar in the same answer in which a plea in abatement is asserted is not a waiver of the matter pleaded in abatement. Little v. Harrington et al., 71 Mo. 390; Cohn v. Lehman et al., 93 Mo. 574. (4) A failure of the appraisers to agree on an umpire or upon the amount of loss or damage is not a waiver. The letters, therefore, introduced against defendant's objections, and marked alphabetically A to S inclusive were erroneously admitted in that they did not tend to prove a waiver and were otherwise irrelevant to any issue, and so far as these letters were concerned, or the fact that the appraisers did not agree upon an umpire, the verdict should have been directed as requested. 2 May on Insurance (3 Ed.), sec. 496b; Ostrander on Fire Insurance (2 Ed.), p. 620; Westenhaver et al. v. Ins. Co. (Iowa), 84 N. W. 717; Fisher v. Ins. Co., 50 Atl. 282; Levine v. Ins. Co., 66 Minn. 138, 68 N. W. 855; Davenport v. Ins. Co., 10 Daly 535; Carroll v. Ins. Co., 72 Cal. 297, 13 Pac. 863; Hood v. Hartshorn, 100 Mass. 117; Ins. Co. Maitland, 63 N. E. 755, 158 Ind. 393; Silver v. Assurance Co., 164 N. Y. 381. (5) All that passed between the appraisers being contained in the letters marked alphabetically A to S inclusive, the legal effect of such letters was a question of law for the court and not for the jury. Their legal effect was not that the defendant thereby waived the determination of the amount of the loss by award of appraisers; and, therefore, the court erred in admitting

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such letters. They showed, on the contrary, that the assured's appraiser prevented the selection of an umpire. (6) A denial of liability by the defendant for the first time in an answer when sued is not a waiver of the condition requiring that the amount of the loss shall be determined by agreement of the parties or award of appraisers before any claim becomes due. (7) The substantive facts alleged in the petition, as contradistinguished from the legal conclusions of the pleader, do not show that the claim was due and payable when the suit was brought, and, therefore, the court erred in overruling the motion of defendant in arrest of judgment. 4 Ency. of Plead. & Prac., 641; Lanford v. Sanders, 40 Mo. 160; Burdsall v. Davies, 58 Mo. 138; Salisbury v. Rixon, 50 Mo. 142; Simms v. Steamboat "Indiana," 28 Mo. 335; Pearson v. Ins. Co., 26 Ins. Law Jour. 176; Carberry v. Ins. Co., 51 Wis. 565, 8 N. W. 406.

McNatt & McNatt and *H. H. Bloss* for respondent.

(1) Our contention is, first; there was not a disagreement as to amount of loss and this was the essential that made the contract binding on the assured even after being signed by him. Boyle v. Ins. Co., 169 Pa. St. 349, 32 Atl. 551; Chapman v. Ins. Co. (Wis.), 62 N. W. 422; Farnum v. Ins. Co., 83 Cal. 246, 23 Pac. 869. (2) Even had this disagreement taken place respecting the loss, and as in this case the assured discovered after signing the arbitration agreement that the intention of the company was not to pay the loss, after it was ascertained by award, would he still have to go on with the proceeding that would bring nothing? The evidence is that the arbitration contract was signed May 14, 1902, after the arbitration agreement was signed, Mr. S. Carp met Mr. Welch at Monett, asked him respecting the loss, and he replied, the matter must be adjusted by the courts, or words to that effect. He then wrote his

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brother that suit would have to be brought. At this time Mr. Welch was proven to be the agent of the company by the signature on this very arbitration contract. Having thus ascertained the company's intention after signing the contract, the arbitration clause of the policy was no longer available as a defense to defendant. Dautel v. Ins. Co., 65 Mo. App. 51. (3) As further indicating the intention of the company respecting the loss, the evidence of James Wilson, and that of the company itself by its solemn declaration in court, was offered showing a denial of liability and a waiver of the policy condition, which even if effective according to defendant's contention by reason of a disagreement of the amount of loss, would be waived by such intention of the company. Seipel v. Ins. Co., 55 Mo. App. 233; Fink v. Ins. Co., 60 Mo. App. 578. (4) The letters show that Mr. Jonas was trying to secure appraisers at or in the neighborhood of the fire. Each one selected after repeated suggestion of persons by Mr. Jonas who were refused by Mr. Potts without assigning any valid reason and in turn wanting persons away from the place of the fire. This evidence offered in this case by the company showed a complete waiver of their right to insist on arbitration without anything further, because appellant was entitled to an umpire in the neighborhood of the fire. McCullum v. Ins. Co., 113 Mo. 606; Ins. Co. v. Bishop, 49 Ill. App. 388; Braddy v. Ins. Co., 115 N. C. 354. (5) We think this a fair analysis of this correspondence and showed a waiver of itself upon which the jury were entitled to pass. Brock v. Ins. Co., 102 Mich. 583, 47 Am. St. 562, 26 L. R. A. 623; Bishop v. Ins. Co., 56 Hun 642, 9 N. Y. Sup. 350, affirmed N. Y. 488. (6) But if the court does not want to even take this view of it and simply want to accord us evenly at fault in this correspondence, the admitted fact remains that the arbitrators could not agree on an umpire and this entitled to the plaintiff to sue, since there was no clause of the agreement providing for a resubmission in such

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contingency, and no law of the state providing for same. 2 Am. and Eng. Ency. of Law (2 Ed.), p. 601, citations; Pretzfelder v. Ins. Co., 116 N. C. 491.

GOODE, J.—The plaintiff owned a stock of merchandise in Aurora, Missouri, on which he held a policy of insurance from the defendant company. During the life of the policy, to-wit: January 29, 1902, the stock was destroyed by fire and this action was instituted to recover the promised indemnity of one thousand dollars. The plaintiff was the proprietor of the goods, but he resided in St. Louis and left the management of the store to his brother Sam Carp, who appears to have had general authority as the plaintiff's agent. Plaintiff was in Aurora, lodging with his brother, when the loss occurred. The fire broke out, or was detected, shortly after midnight. The two brothers swore they retired that night about nine o'clock and did not leave their beds until aroused by the alarm of fire; but there was considerable testimony that Sam Carp was seen about the store at ten o'clock and again shortly before the fire. This testimony clouds the case with suspicion concerning the honesty of the loss and supports the defense that it was due to the incendiary act or procurement of the plaintiff. There was contervailing evidence in favor of an innocent origin of the fire, and we hold this issue was settled by the finding of the jury in plaintiff's favor. We are asked to reverse the finding on the assumption that the evidence to prove the fire was incendiary was so overwhelming as to produce an irresistible conviction that it was; but we decline to so hold. There was much very contradictory evidence and enough on either side of the question to support whatever finding the jury might make.

The point we must decide arises on a clause of the contract providing that:

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by

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two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers selected by them and shall bear equally the expenses of the appraisement and the umpire. This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal. . . . And the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required, have been received by this company, including an award of appraisers, when appraisal has been required. . . . No suit or action on this policy for the recovery of any claim, shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements. . . . This policy is made and accepted subject to the foregoing stipulations and conditions.''

It is requisite, in view of one point made by the plaintiff in favor of an affirmance, to state the substance of the answer; for the plaintiff contends that by virtue of a like answer in a former suit, the defense of non-observance of the appraisement clause of the policy was waived. Besides a qualified general denial, the answer in this case interposed four defenses: First, a denial that the plaintiff had sustained damages to the amount alleged in the petition, $12,000. Second. There was a difference in regard to the amount of the loss and the above appraisement or arbitration clause was not carried out before the plaintiff sued; wherefore his action was premature. Third. The plaintiff falsely stated in his proofs of loss the sound value of the goods described

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in the policy and the damages sustained. The answer alleged the damage did not exceed $1,000 instead of approaching $12,000, as sworn to in the proofs of loss. This false statement was averred to avoid the policy by virtue of a term in it that it should be void in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, before or after the loss. Fourth. The plaintiff had set or caused the fire to be set, with the intent to defraud the defendant.

Plaintiff's reply admitted the execution of the arbitration agreement, "for the sole purpose of determining the amount of the loss or damage by fire to the property;" averred that he acted in good faith in selecting an appraiser, that the two appraisers had been unable, after making every reasonable effort to do so, to agree on an umpire, and had failed to determine the amount of damage done by the fire, without fault or connivance on the part of the plaintiff. The reply further averred that the insurance company fraudulently induced plaintiff to execute the arbitration agreement in order to prevent him from suing for his loss and with no intention to have the loss appraised, or to pay it; that the company failed and neglected to assist plaintiff in procuring an appraisement; that because of its conduct the failure to have the loss appraised was no bar to the prosecution of this action. In further avoidance of the defense of want of appraisement, the reply averred that after the agreement to appraise had been signed, but prior to the institution of the present action, the defendant had denied all liability to plaintiff for other reasons than non-appraisement of the loss, namely; because, as it contended, the plaintiff had made false statements under oath, as to the value of the goods and the amount of the damage and had intentionally caused the fire. It will be gathered from the above digest of the replication that it raised an issue as to a waiver by the defendant of the arbitration clause of the policy; and an issue also,

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as to the defendant's good faith in the attempt made to obtain an appraisal.

In support of the defense that the cause of action had not accrued when the suit was instituted, the defendant introduced an agreement, executed by the plaintiff and seven insurance companies, including the defendant, and submitting to appraisers the question of the amount of the plaintiff's loss, with a proviso that the appraisement should be "without reference to any other questions or matters of difference within the terms and conditions of the policies of said company and shall not determine, waive or invalidate any other right or rights of either party to this agreement; but shall be of binding effect only so far as regards the sound value of the property before the fire and the direct or immediate total loss or damage caused by said fire to said property." That proviso accorded with the policy. The agreement contained the names of Sol Jonas of Aurora, Missouri, selected as appraiser by the plaintiff, and of M. A. Potts, selected by the company, and provided that those parties should choose an umpire to decide any differences they might have. Who asked for the appraisement was not shown; but the agreement was willingly signed by Carp and without fraudulent procurement by the company, though it may have cherished an intention to make use of the agreement to postpone or evade payment. It was signed May 14, 1902. On June 5th, Potts, the appraiser chosen by the company, wrote to Jonas, suggesting that before they went to any expense they ought to select an umpire. Potts asked Jonas to name two or three men who lived outside Aurora. Jonas immediately replied, suggesting the name of a man in Carterville. Potts declined to agree to that man and named three men residing in Kansas City, offering to accept any of them. Jonas refused to agree to one of those men and suggested Mr. Matlock, of Marionville, who proved unacceptable to Potts. Jonas then asked Potts whether there was any

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one in Aurora, Peirce City, Mt. Vernon or Verona, all towns in southwest Missouri, on whom he would agree, and if so to state the name of that man. Potts replied that he could not think of any one in those towns as his acquaintance did not extend to them, but offered to take Mr. Sanford of Springfield. Jonas would not agree to Sanford, whereupon Potts suggested S. E. Post of Aurora. Jonas would not agree to Post because Post had been a witness against Sam Carp in a criminal prosecution for burning the store. Jonas accused Potts of being insincere in suggesting names from whom an umpire should be chosen. Potts next named Q. C. Boyd, of Mt. Vernon, and said he would continue to send names until Jonas accepted a good man or showed he was unwilling to arbitrate at all. Jonas refused Boyd, conceding he was a good man, but saying he showed some interest in the trial of Sam Carp on the criminal charge. In this letter he (Jonas) named four men, all from nearby towns, and told Potts if he did not agree to one of them by September 20th, that he would have nothing more to do with the affair. This letter was written September 12th, but Potts did not get it until September 18th, and then wrote saying he had no time to investigate the qualifications of the names submitted before the date fixed as the expiration of Jonas's ultimatum. In that letter Potts submitted the names of four men, residents of Lawrence county near Aurora. The next day, September 19th, Jonas wrote that as Potts had declined to accept any name sent him, Jonas would refuse to consider the names submitted by Potts; that further correspondence was useless and he (Jonas) would have nothing more to do with the matter. The two appraisers never met and all the business between them was conducted by correspondence. The letters, which extend over the interval from June 5th to September 19th, are written in a suspicious and captious strain, particularly on the part of Jonas, who was impressed with the belief that Potts's conduct was equiv-

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ocal and that he did not intend to agree to a fair umpire. Those letters were put in evidence by the plaintiff for the purpose of proving the insurance company had waived the arbitration clause of the policy; and in further proof of that contention, the plaintiff introduced an answer which had been filed by the defendant company in a prior suit involving the same cause of action this one does, but instituted before any effort had been made to carry out the appraisal agreement. That case was dismissed by the plaintiff September 17, 1902, after the defendant had filed an answer exactly like the one filed in this case: that is to say, an answer pleading that the loss had never been appraised; that the plaintiff had been guilty of false swearing as to the value of the property and the amount of his loss and that the fire was of incendiary origin and due to his act or procurement.

The court admitted the first answer, against the objection of the defendant, on the theory that it tended to prove a denial of liability by the company on other grounds than a lack of appraisement, and, therefore, to prove the company had waived the appraisement clause of the policy before the institution of the present suit. The defendant saved an exception to that ruling and likewise saved an exception to the admission of the letters of the two appraisers, which were objected to as having no value as evidence to prove a waiver of the appraisement clause.

The court gave this instruction to the jury bearing on the point in hand:

"The court instructs the jury, that notwithstanding you may believe from the evidence that the policy of insurance sued on herein contains a provision to the effect that the loss, if any, under the policy should be determined by appraisers after due notice of loss had been given the company; yet, if you further believe from the evidence, that prior to the institution of this suit the

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defendant company denied liability on the policy sued, for other reasons than that no arbitration has been consummated, then the necessity of arbitration was waived and the plaintiff is not precluded from recovering for that reason."

The defendant requested a peremptory instruction for a verdict in its favor, which was refused by the court, as were other requests of the defendant which need not be recited. Exceptions were saved to the court's rulings on the instructions.

The above statement brings out fully, we think, the matters which demand attention in disposing of this appeal.

It is the law that a denial by an insurance company of any liability for a loss, dispenses with a term of the policy requiring an appraisement of the amount of the loss; because the purpose of an appraisement is to ascertain what the damage is in order that the company may discharge its obligation to indemnify the insured. If it takes the stand that it is not liable at all and will pay nothing, it would be senseless to incur the trouble and expense of an appraisement. Vining v. Ins. Co., 89 Mo. App. 311; Dautel v. Id., 65 Mo. App. 44. But does the same consequence result from pleading in an answer the defense of incendiarism, or other act of the insured sufficient to annul the policy, and also the defense that the loss had not been appraised? We think not. An insurance company may believe, for many reasons, that it has a complete defense on the merits to an action on a policy, and nevertheless prefer to settle with the insured at a reasonable estimate of his loss, rather than have litigation. The result of such litigation is doubtful and, moreover, may impair the confidence of a community in the company's willingness to pay its losses. If liability for the loss is not denied, it is the duty of the insured to demand an appraisal when the policy provides, as the one in suit does, for an appraisal as a condition precedent to the right to sue. Murphy v. Ins. Co., 61 Mo. App.

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323; McNees v. Ins. Co., Id. 335; Hamilton v. Ins. Co., 136 Mo. 242; 4 Joyce, Ins., sec. 3231. If the insured sues without seeking an appraisement, the company may plead that fact in its answer as a defense. But it may state any other defense it has in the same answer; and, generally speaking, a defendant must plead all his defenses in one answer or forego such as are not stated. Cohn v. Lehman, 93 Mo. 574. If an insurance company alleges incendiarism, or other act sufficient to defeat the case, it does not waive thereby its defense of lack of appraisement. Little v. Harrington, 71 Mo. 391. Plaintiff's counsel do not say the company waived the arbitration requirement by the answer filed in the present action, but insist that it was waived as a defense to the present action by the answer filed in the first one. This reasoning is fallacious. If it were accepted, a policy-holder could always elude the appraisal clause of his contract, or cut the insurance company out of a defense to his demand on the merits, by bringing an action, then dismissing it and bringing a second one. If, in the first action, the company answered, denying liability and stating a defense on the merits, that answer would constitute a waiver of the defense of lack of arbitration to the second action. If the company did not deny liability in the first action because of facts going to the merits, it would have to try the case without using those facts. The result would be that an insurance company could not defend an action on a policy both on the merits and for non-compliance with the appraisement clause. But the law is to the contrary. The denial of liability which dispenses with the necessity of an appraisal must occur, except under special circumstances, before answering in a suit on the policy; for a suit will not lie without previous appraisal, when the company has not denied liability or otherwise waived the condition. This question received attention and was decided in accordance with what we have said, in Kahnweiler v. Ins. Co., 57 Fed. 562. We quote from the opinion in that case:

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"The plaintiffs insist that the provision in the policy for arbitration has been waived by the company, and is inoperative; that the company could not invoke that provision to abate or defeat the plaintiff's suit, because it made no demand for arbitration, and because it denied its liability *in toto*. This denial of liability *in toto* appears for the first time in the answer of the defendant in this suit. Up to that time the company had offered to pay its proportion of what it claimed was the actual loss of the insured, but there was an irreconcilable difference between the parties as to the amount of that loss, thus bringing the case within the provisions of the arbitration clause of the policy. Inasmuch as the arbitration should precede any suit, at no time during the period for arbitration did the company deny its liability for the loss. That the company had set up in one count of its answer a denial of any liability does not affect the case. It might waive any objection to the cause of the fire, and offer to settle, to avoid litigation; but this would not affect its right when sued, to set up in its answer any legal defense it had to the action."

Consult, too, Murphy v. Ins. Co., 61 Mo. App. 323; Phoenix Ins. Co. v. Varnahan, 58 N. E. 805.

The answer filed by the defendant in the first case, neither proved nor tended to prove a waiver of the arbitration clause of the policy and was improperly received in evidence for that purpose. In truth it insisted on the appraisement, as the present answer does.

For a kindred reason, the instruction that if the company denied liability prior to the institution of this suit for other reasons than that there had been no arbitration, the necessity of an arbitration was thereby waived, was erroneous. Nothing was adduced in support of the contention that the company had previously denied liability except the first answer, which was irrelevant.

It does not follow, as defendant's counsel argue, that the plaintiff should be nonsuited on account of the

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prematurity of the action. While compliance with the arbitration clause of an insurance contract, such as we have here, is a condition precedent to the right to sue, and while a company may avail itself of the insured's default in that regard, both the company and the insured must act in good faith in an attempted compliance. The requirement can not be used as a means to baffle the insured or indefinitely postpone his right to sue. The law accepts the requirement as a just and reasonable method of ascertaining the amount of the loss, when the amount is in dispute, and insists that when it is invoked and put into operation, there shall be a fair and reasonable effort to make it successful. If the insured, or his chosen appraiser, acts in bad faith and prevents an appraisement by postponing indefinitely the choice of an umpire, or otherwise, the fact will be a defense to any suit he brings. Caledonia Ins. Co. v. Traub, 35 Atl. (Md.) 13; Hamilton v. Ins. Co., 136 U. S. 945. Hence if Carp or Jonas, by unfair or arbitrary conduct, caused the appraisement to fail, this action must fail too. When a company does not in good faith carry out an agreement to arbitrate the amount of the loss, but endeavors to utilize the agreement to obtain delay, it absolves the insured from compliance with the clause as a condition precedent to his right to sue (or waives an appraisal, if one chooses to put it that way, though the expression is not strictly accurate), and he may maintain an action although there has been no appraisement. The unfair behavior of an appraiser may be taken into account against the party that appointed him in fixing the blame for the failure to execute an appraisal agreement. McCullough v. Ins. Co., 113 Mo. 606; Uhrig v. Id., 101 N. Y. 362; Bishop v. Id., 130 N. Y. 488; Bradshaw v. Id., 137 N. Y. 137; Hickerson v. Ins. Co., 32 L. R. A. (Tenn.) 172; Brock v. Id., 26 L. R. A. (Mich.) 623; Chapman v. Ins. Co., 89 Wis. 572; Continental Ins. Co. v. Vallandingham, 76 S. W. (Ky.) 22. An appraiser, by whomsoever chosen, is ex-

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pected to act as an impartial and disinterested judge; not as an advocate or automaton of one party to the controversy.

If both parties to an insurance contract endeavor to prevent an appraisal, or to render abortive an agreement for one, the appraisement clause of a contract will cease to be a condition precedent to a right of action; because neither the insured nor the company sincerely desires to have the loss ascertained in that manner.

A question of fact as to the bona fides of the parties arose on the correspondence, for the jury to determine. The letters might produce an impression against the sincerity of Carp or the company, or both; and if the company was to blame for the failure of the attempt to arbitrate, and Carp was innocent, this action was not prematurely brought; otherwise it was. An honest, but futile effort by the appraisers, unless it caused a too protracted and wholly unreasonable delay, would not dispense with the need of an appraisal. See cases supra; also Read v. Ins. Co., 103 Iowa 307; Westhaver v. Id., 84 N. W. 717; Vernon etc. Trust Co. v. Id., 63 N. E. 755.

The defendant insists that as the entire evidence on the question of why the arbitration failed, was found in the letters, it was for the court to construe them and determine their effect. But the rule of law that courts must determine the meaning of documentary evidence has no relevancy when the dispute is not as to the legal meaning of documents, but as to their tendency to prove one side or the other of an issue of fact and different inferences may be fairly drawn from them as to what the truth was. Chapman v. R. R., 146 Mo. 481. We think it was fairly a question for the jury under all the facts in this case, as to whether the failure to arbitrate was the fault of the insurance company or of Carp, and that said question ought to be submitted to them under proper instructions.

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The plaintiff's counsel say there was no disagreement between Carp and the insurance company as to the amount of the loss, and that hence the arbitration clause did not become operative. It is certain the insurance company now disputes the value of the burned property and the extent of the loss as asserted by Carp, and the fact that the parties entered into an arbitration agreement is evidence that there was a disagreement before they entered into it. We think a party can not submit such a question to appraisers and then say the submission was void because there had been no dispute over the amount of the loss. The authorities cited to support this proposition are not in point; for they go merely to the proposition that when arbitration was not agreed to, an insurance company can not defend on the ground of lack of arbitration, if there had been no disagreement about the amount of the loss. That there had been no disagreement between these parties, if such was the fact, might have been a good reason for Carp's refusal to agree to an appraisal, but is not a good reason for treating the agreement he made for one, as a nullity.

Neither do we accept the argument that paintiff was privileged to withdraw from the appraisal agreement at any time. The law is the other way. Chapman v. Ins. Co., supra. Certain authorities are cited by the plaintiff's counsel in support of that contention; but they relate to instances where the arbitration was intended to cover the whole question of liability and not merely the value of the burned property. Arbitration provisions of that sort would, if enforced, oust courts of their jurisdiction; but it is different when the policy simply provides for an appraisal of the amount of damage sustained. Not only is it no privilege of an insured to withdraw from an agreement for an arbitration of that kind, but he can not sue on his policy until he has complied with the stipulation for such an arbitration or honestly tried to comply, unless the insurance company does something to excuse him.

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The circuit court declined to permit Sam Carp to answer some questions propounded to him on cross-examination as to whether he had borne alias names or had tried to induce a witness in the case to swear falsely. The testimony sought to be elicited was competent as affecting his credibility. We think those matters were within the range of a proper cross-examination.

The judgment is reversed and the cause remanded. *Bland, P. J.*, and *Reyburn, J.*, concur.

GRAY, Appellant, v. GRAY, Respondent.

St. Louis Court of Appeals, February 16, 1904.

1. **CIVIL DEATH OF CONVICT: Right to Sue One Convicted of Crime.** The civil death which attaches, under section 2382, Revised Statutes of 1899, to a person convicted of an infamous crime, destroys his right to sue or make contracts, but does not protect him against the suits of others.

2. ———: ———: **DIVORCE.** Section 2921, Revised Statutes of 1899, which makes conviction of an infamous crime a ground for a divorce, presupposes the right of the innocent party to sue the convicted one.

3. ———: ———: **Courts Should Protect Defendant.** The courts should protect the rights of a defendant so disabled, and it would be proper to appoint some attorney to look after his interest; especially if property interests are involved.

Appeal from Scotland Circuit Court.—*Hon. E. R. McKee*, Judge.

REVERSED AND REMANDED.

Smoot, Boyd & Smoot for appellant.

Service is valid and regular for the purpose of jurisdiction, even though the party when served be in prison. Davis v. Duffie, 3 Keys (N. Y. App.) 606; 22

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Am. and Eng. Ency. (1 Ed.), page 156; 1 Abb. App. Dec. (N. Y.) 486; State v. Washington, 37 La. Ann. 828; 12 Moak's Rep. 688; Smith v. McGlasson, 7 J. J. Marsh (Ky.) 154; Grant v. Dalliber, 11 Conn. 234; R. S. 1899, sec. 2382; R. S. 1899, sec. 2921; Williams v. Shackelford, 97 Mo. 322.

GOODE, J.—The parties to this action were married in June, 1901. In February, 1902, the defendant was found guilty of the crime of forgery and sentenced to the State penitentiary for a term of years. In January, 1903, the plaintiff instituted this action for divorce on the ground of Gray's conviction of felony; a writ was issued directed to the sheriff of Cole county, where the defendant was imprisoned, and was served on the defendant, and a return made showing full compliance with the statutory requirements of service.

The evidence shows the parties lived together only three weeks, when the defendant was apprehended for the crime of which he was convicted; further, that the defendant was under conviction for the like crime in the State of Illinois at the date he was married, of which fact his wife was ignorant. He was absent from the Illinois prison on his parole when the marriage took place. The record of the conviction in the circuit court of Scotland county, Missouri, was put in evidence. On these facts the court below dismissed the plaintiff's petition for the reason that the defendant was civilly dead pending his imprisonment and incapable of being sued. R. S. 1899, sec. 2382. That ruling of the circuit court was erroneous. The civil death which attaches to a person as an incident of his conviction of an infamous crime, destroys his right to sue or to make executory contracts, but not the right of others to prosecute suits against him.

Mr. Chitty, in speaking on the subject, says: "This situation of *civiliter mortuus* is never allowed to protect him (an attainted or convicted person) from the claims

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of private individuals or the necessities of public justice; so that, though he can bring no action against another, he may be sued and an execution may be taken out against him.'' 1 Chitty, Criminal Law, 725; see also Davis v. Duffie, 8 Bosw. 617; 3 Keys 606; Smith v. McGlasson, 7 J. J. Marsh (Ky.) 154; Phelps v. Phelps, 7 Paige 150. Numerous other authorities might be cited.

As was said in Davis v. Duffie, to hold that a party imprisoned for a felony can not be sued would suspend, not only the convict's civil rights, but the right of all other persons to proceed against him for debts or other causes of action. The disability attaches only to the guilty man. Our statute prescribes that one party to a marriage may obtain a divorce if the other is convicted of a felony or infamuos crime during the marriage. R. S. 1899, sec. 2921. That law presupposes the right of the innocent party to sue the convicted one for a divorce.

The jurisdiction was in the county of the residence of the parties prior to the defendant's imprisonment, and the action was properly brought there. Hanson v. Hanson, 111 Mass. 158.

Courts should carefully protect the rights and interests of a disabled defendant in a proceeding like this, and it would not be improper to appoint some attorney to look after the case as the friend of the court if no defense is made; especially if property interests are involved.

The judgment is reversed and the cause remanded.
Bland, P. J., and *Reyburn, J.*, concur.

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STEER, Admr., Respondent, v. DWYER, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **MINES AND MINING: Royalty.** Where the lessor of a zinc mine collected his royalty monthly from his lessees, to his satisfaction, knowing the quality and amount of matter taken from the mine, his administrator can not, after his decease, recover royalty for stuff removed from the mine during his lifetime, which was treated at the time as waste, and proved to be practically worthless when afterwards the lessees attempted to utilize it.

2. **NEW TRIAL: Counterclaim.** Where the jury gave a verdict allowing a claim which was entirely unfounded and required a reversal of the case, and allowed also a counterclaim which was supported by meager evidence, and it seemed as if the jury had allowed it more to offset plaintiff's demand than because of its merits, the cause will be remanded for new trial on the counterclaim.

Appeal from Howell Circuit Court.—*Hon. W. N. Evans*, Judge.

REVERSED AND REMANDED.

Orr & Luster for appellant.

The court erred in refusing to sustain defendant's motion for judgment on the verdict in his favor for the $710, found to be due and owing defendant, there being absolutely no evidence in favor of plaintiff's claim.

Livingston & Burroughs for respondent.

Appellant has no cause for contention — no valid right to appeal—and there is nothing in this court to determine, except to affirm the judgment of the trial court. Appellant filed his set-off and obtained judg-

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ment for all he claimed. By filing his cross-action he admitted plaintiff's cause of action. A set-off is a cross-debt. It is a mode of defense whereby the defendant acknowledges the justice of plaintiff's demand on the one hand, but on the other sets up a demand of his own to counterbalance it, either in whole or in part. It admits the cause of action. Jones v. Moore, 42 Mo. 413; Hay v. Short, 49 Mo. 139; Zerbe v. Railway, 80 Mo. App. 414-418.

GOODE, J.—On September 10, 1895, P. S. Robinson, now deceased, leased fifteen acres of land in Ozark county to Joseph Bennett and Ham Baldwin, for mining purposes. The clause of the lease with which we are concerned, is this one:

"Said parties of the second part, their heirs, assigns, or legal representatives, agree to pay to the party of the first part as royalty, the sum of $1 per ton for all zinc ore and ten per cent on all other ores mined and removed from said lands."

The lease passed by several assignments to Daniel Dwyer, Price Weatherill and W. F. Gordon, who acquired it in May, 1899. Those parties organized the Alice Mining Company June 19, 1899, and the testimony is that the assignment was really for the benefit of that contemplated corporation, which conducted a mining business on the land from the time it was organized until August, 1900. The Alice Mining Company afterwards sold its property, including the lease, to the Renfrow Zinc Oxide Company, another corporation, which had acquired mining lands in the same locality. Robinson died in 1901, and plaintiff Steer is the administrator of his estate.

This action was brought by the administrator after Robinson's death, on the clause of the lease which we have quoted, to recover the royalty on 3000 tons of zinc ore mined and removed from said premises, the petition alleges, during the lifetime of Robinson, but the royalty

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on which the defendant refused to pay to Robinson during his life. It should be stated that in addition to the fifteen acres, the Alice Mining Company had leased or purchased from M. J. Romans, June 10, 1899, two acres near the leasehold, and when they took out ore on the leasehold they hauled it to the two-acre tract and there screened and washed it to separate the ore from the refuse matter. The result was that a dump of tailings or refuse accumulated on the two-acre tract during Robinson's lifetime, and was there when he died. There were about 1100 tons of this stuff. Robinson was paid by check once a month for his royalty, during all the time the Alice Mining Company or Dwyer and his colessees, were mining on the leasehold; that is, from June 1899, to August, 1900. He saw the ore taken out of the mine, hauled to the washer, screened and washed, and saw, too, the dump of tailings. He never received or asked for any royalty on this refuse matter, but accepted checks for his royalty in settlement each month. Sometimes it appears there was a controversy between him and the lessees as to what he was entitled to, but an amicable settlement was always reached and he was paid. The checks are in evidence. After the Renfrow Oxide Company bought the lease and other mineral property in the vicinity, it established an oxide plant in West Plains and hauled the dump of tailings to West Plains to experiment with and see if the material could be turned to account. The experiment was a failure and though the evidence shows they worked up about 500 tons of it, it proved to be worthless—had no market value and could not be utilized.

This litigation began by the administrator Steer suing Dwyer for the royalty on those tailings after Robinson's death. Dwyer, besides disputing the demand, filed a counterclaim for a commission of $710, which he alleged Robinson owed him for selling the leasehold tract of land as the latter's agent.

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The jury found a verdict for the administrator for $1,136, and for Dwyer for the full amount of his counterclaim. Judgment for the difference, or $426, was entered against Dwyer, and he appealed.

His counsel insist that the verdict against him for the royalty on the tailings was unsupported by any substantial evidence, and we must concede that contention. Without going into the somewhat doubtful point they make against the finding, that the Alice Mining Company instead of Dwyer is responsible, it suffices to say that in our opinion the evidence shows so clearly as to leave no doubt on the subject, that Robinson was fully paid his royalty on all the ore Dwyer and his associates mined and removed from the leasehold during the time they were operating. It will be observed that the lease provided that Robinson should be paid one dollar royalty on all zinc ore mined and removed from the land. These tailings, as well as the valuable ore, were both mined and removed from the leased premises while Robinson was living and the undisputed evidence shows that he was about the premises, saw the work carried on, the screening and washing of the ore, and the dump of tailings on the nearby two-acre tract. He took his checks in payment of his royalty as it fell due each month, knowing that no royalty on the tailings was covered by them and without complaint. In fact, there can be no doubt that both he and the lessees regarded these tailings as worthless, and there is as little doubt that they were worthless. A witness or two swore they had shipped refuse matter to St. Louis at one time and sold it and that it contained twenty-five or thirty per cent of zinc ore. But those tailings were left when the mined product was separated by hand; not washed and screened. To require payment of royalty on stuff that it is obvious both Robinson and his lessees treated as waste and not the subject of royalty, long after he had been paid all he claimed and after his death would be rank injustice. Steer appears to have brought suit because the

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Renfrow Oxide Company afterwards took the tailings to West Plains and endeavored to utilize them; and for that reason he conceived they must have had a value. As Robinson and the lessees concurred in treating them as worthless, as the evidence shows they were of no value, and as he was paid his royalty to his satisfaction, there is no merit in the present demand by his administrator against this defendant. In fact Dwyer did nothing with the tailings. The proof on that point is indisputable. He owned stock in the Renfrow Company and doubtless knew that company experimented with them; but the attempt to make use of them was not his personal act.

We might let the judgment on the counterclaim stand, but think, on the whole, there had better be a retrial. Robinson had given Dwyer an option to purchase the land, for the sale of which the latter asks a commission, or to sell it. This document bears the date of September 2, 1899, and declares time to be of its essence. The time allowed Dwyer to buy or sell in, was four months; the deed from Robinson to the Renfrow Company was executed March 13, 1901, or a year and one-half after the option contract.

Whether the sale was made by virtue of the authority of said contract, whether the time was extended, or whether a new arrangement was effected, we know not. Dwyer introduced the option agreement and, as we gather, relied on it to prove his agency; but it contained no stipulation to pay him a commission if he sold the land, and there is very little, if any, proof in the record that he expected to receive a commission from Robinson or ever demanded one. It looks like the jury allowed the counterclaim more for the purpose of off-setting the administrator's demand than because of its merit. However that may be, we think that in view of the meagre support it has, justice will be promoted by another trial of the issue, in order that the facts may be more fully developed.

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The judgment is reversed and the cause remanded in order that there may be a retrial of the counterclaim if the defendant desires it. *Bland, P. J.*, and *Reyburn, J.*, concur.

BOYCE et al., Respondents, v. THE ROYAL CIRCLE, Appellant.

St. Louis Court of Appeals, February 16, 1904.

INSURANCE: Mutual Benefit Association: Certificate of Health. In an action on a benefit certificate issued by a fraternal beneficiary society, where the question for determination was whether the deceased had paid his dues, and a per capita tax, required by the rules of the order, within the time they were payable, and it appeared the defendant had refused to accept such dues and tax which were tendered after a given time, a demand for a health certificate required by the rules of a delinquent, as a condition of accepting such payments was an arbitrary measure and it was not necessary to show presentation of such health certificate in order that plaintiff might recover.

Appeal from Texas Circuit Court.—*Hon. L. B. Woodside,* Judge.

Affirmed.

Edwin S. Puller and *Covert & Covert* for appellant.

(1) The petition of plaintiffs states that the certificate was issued to Henderson on condition (among others) that he comply with the rules and regulations then governing the circle and the benefit fund, and that might thereafter be adopted by the supreme circle to govern said circle and fund. These rules and regulations, known as by-laws, provide for the suspension of the member and the forfeiture of his certificate in two

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cases: First, for failure to pay the semiannual per capita tax of 75 cents during the months of June and December of each year, and second, for failure to pay any monthly assessment (due and payable by the terms of the by-laws on the first day of each month) within thirty days from the date it becomes due and payable. By his failure to pay the semiannual per capita tax of 75 cents during the month of June, 1900, he elected to withdraw and did withdraw from the society, and forfeited all rights against the society. His failure to pay the monthly assessments due and payable respectively on the first days of May, June and July, 1900, within thirty days from those respective dates, forfeited his membership and all rights against the defendant. Borgraefe v. Knights of Honor, 26 Mo. App. 218; Scheele v. State Home Lodge, 63 Mo. App. 277; Miller v. Grand Lodge, 72 Mo. App. 499; State ex rel. v. Grand Lodge, 78 Mo. App. 547; Yoe v. Assn., 63 Md. 86; Rood v. Assn., 31 Fed. 62; Gunther v. Assn., 40 La. Ann. 777; Society v. Baldwin, 86 Ill. 479. (2) The failure to pay either of the two classes of assessments *ipso facto* worked a forfeiture of his certificate and suspension of his membership. It then devolved upon plaintiffs to show his reinstatement and the revitalizing of his certificate in the manner provided in the by-laws, namely, payment of the assessment, accompanied by the required health certificate. Harvey v. Grand Lodge, 50 Mo. App. 472-477; Chadwick v. Triple Alliance, 56 Mo. App. 472; Curtain v. Grand Lodge A. O. U. W., 65 Mo. App. 294.

W. L. Hiett with *Lamar, Barton & Lamar* for respondent.

(1) The defense in this case is based upon a forfeiture of the certificate sued on, and all rights thereunder, because of failure to pay certain assessments and

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dues. The certificate does not require any to be paid, and before a forfeiture can be predicated upon such failure to pay, the assessment must be levied. Earney v. Modern Woodmen of America, 79 Mo. App. 385; Hannum v. Waddill, 135 Mo. 161; Agnew v. A. O. U. W., 17 Mo. App. 254; Niblack on Ben. Soc. (2 Ed.), secs. 250 and 252; Am. Mut. Aid Soc. v. Helburn, 7 Am. St. 571 and note; Shea v. The Mut. Ben. Assn., 39 Am. St. 475; Bacon on Ben. Soc., 377. (2) For the reasons hereinbefore stated there was an entire failure to prove that deceased owed defendant any assessment or per capita tax, and without which testimony a failure to pay will not work a forfeiture. The jury, therefore, arrived at the only verdict that could have been rendered under the evidence, and the judgment being for the right party it will not be reversed. Bank v. Hoeber, 88 Mo. 37; Ittner v. Hughes, 133 Mo. 689; Earney v. M. W. A., 79 Mo. App. 385.

GOODE, J.—This case was here on a former appeal and will be found reported in 99 Mo. App. 349, 73 S. W. 300. The record at that time was in a very incomplete state and showed practically no evidence for the plaintiff except the certificate of insurance and a section or two of the constitution of the order. So far as we could gather, no proof was offered by the plaintiffs that they had paid the per capita tax for the latter half of the year 1900, or some of the monthly assessments. The constitution and by-laws provided for an assessment of fifty cents a month on each member of the class to which the deceased belonged, and also for a per capita tax of $1.50 a year to be paid semi-annually in June and December. As will be seen by the statement in the former opinion, the failure of a member to pay either of those dues within the months they were payable, terminated the membership. A member had the entire month for which an assessment was due to pay it in and could pay his per capita tax at any time during June

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and December. If he failed to pay according to the by-laws, he lost his insurance and could only obtain its reinstatement on a certificate signed by himself that he was in good health; or, if he was in default for more than thirty days, on a certificate signed by the local medical examiner.

At the first trial there was a peremptory instruction to find a verdict for the plaintiffs; apparently on the assumption that it was the duty of the order to make a levy each month of the assessment and to make a levy twice each year of the per capita tax, and that a member owed nothing until a levy was made and notice of it given. On whatever theory the peremptory instruction was granted, we held it to be erroneous and returned the case for another trial. There is a complete transcript of all the evidence taken at the second trial before us now, containing the testimony of Minnie Henderson, sister of the deceased, Thomas J. Henderson, the party insured, as to the payment of, or offer to pay, his dues, as they accrued. She testified positively to paying or tendering various monthly dues during the months they matured and also to tendering the semiannual per capita tax for the latter half of the year 1900, in June, which was the month when it ought to be paid. She said she paid her own dues and tendered her brother's, or paid them, at the same time; that when she tendered the per capita tax, the secretary of the local lodge declined to accept it for the reason that he did not have his book with him and could not enter the payment. If her narration of the facts is truthful, there was simply no delinquency and the attempt to treat Henderson's membership as lapsed after May 31, 1900, was groundless. The secretary of the local lodge disputed her statements and swore the assessment for the month of May was not paid until June 11th, and that the per capita tax was not paid until more than thirty days after its maturity; either of which defaults sufficed, under the by-laws to work a forfeiture of membership. Minnie Henderson

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said she tendered all dues within the time required by the by-laws, until the month of September, 1900, when she was notified that no more would be accepted because her brother's membership had been forfeited. The local secretary said that in August the dues for the months of June and July and the per capita tax were paid by Minnie Henderson, but were subsequently returned to her by him, because they were so far in default when paid as to render necessary a certificate of health from the medical examiner; which she had not furnished, but only a certificate signed by Henderson himself. In this connection it should be stated that the testimony of the secretary, Harrison, shows that he and Minnie Henderson expected the insurance to be reinstated, were co-operating to get the proper papers and that Harrison thought it immaterial whether he or she kept the money pending the reinstatement, and that, with a declaration to that effect, he gave it back to her. She denied it was given back. It further appears that in January, 1901, $1.75 was returned to her by the local secretary, that being the payment of two months' dues which accrued during the fall of 1900, and the per capita tax for the first half of the year 1901. The testimony on the question of the payment of dues is in a very confused state; for Harrison swore no dues were paid in October, November or December, 1900, and again swore the assessments for two months of the autumn and the tax, were paid and afterwards, in January, 1901, restored; though he had previously denied repaying her any money after January 1, 1901. Henderson was in the Indian Territory during this time and died there in August, 1901. During the fall an attempt had been made to reinstate him as a member by getting a health certificate from a physician as required by the by-laws; but this reinstatement was declined by the order.

It will be observed by comparing the stated facts with those which were shown by the former record, that the case as presented now is materially different from

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what it was then. The questions then were, whether any assessments fell due until they were specially levied by some action of the order, and whether prompt payment of the dues had been waived by the conduct of the order. The only question submitted to the jury by the circuit court on the second trial was, whether Minnie Henderson had paid or tendered her brother's dues within the thirty days they were payable, according to the by-laws, up to the time she was notified that no more dues would be accepted. The court instructed the jury that failure to pay a monthly assessment within the month it fell due, or failure to pay the per capita tax within the first month of the period for which it was due, worked a forfeiture; but that if the monthly assessments and the per capita tax were tendered within the time they were payable, no forfeiture was worked. The court further instructed that if the local secretary of the Cabool lodge notified Minnie Henderson in September, 1900, that he would receive no further payments on Thomas J. Henderson's membership unless a health certificate accompanied the payment, the defendant order could not claim a forfeiture of the policy for non-payment of assessments or tax, thereafter, if, as a matter of fact, they found the assessments and tax had been paid promptly and without default. Those instructions declared the law; because the membership could not lapse by forfeiture if every payment was made within the time stipulated in the constitution and by-laws of the order; and under such circumstances a demand for a health certificate as a condition of accepting payments was an arbitrary measure.

Many instructions were asked by the defendant which it would expand this opinion too much to copy. Suffice to say they were either covered by the instructions given or were unsound in their statement of the law, or were inapplicable in view of the theory of the case adopted by the court. Practically, the plaintiffs were cut off from a recovery unless they proved that all

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dues had been promptly paid; and as the only defense was that the insurance had lapsed because the payments were not promptly made, the finding of the jury is conclusive there being a conflict in the testimony.

The judgment is, therefore, affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

ABBITT, Respondent, v. ST. LOUIS TRANSIT COMPANY, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. PERSONAL INJURIES: Elements of Damage: Harmless Error. In an action for damages for injuries to plaintiff's wife, caused by the negligence of defendant, it is not reversible error to instruct the jury to allow for the cost of medicines which they believe plaintiff has purchased, in the absence of proof that any medicines were purchased, where the other proved items of the loss and expenses exceed the award of the jury, and it is evident that the jury allowed no more than a trivial sum, if anything, for the medicines.

2. ———: ———. Nor was it error to instruct the jury to include a reasonable amount paid for medical services, although there was no direct testimony that the charge of the physician was reasonable; the presentation of the physician's bill and its payment is sufficient evidence that it was reasonable to sustain the verdict.

3. ———: ———: Loss of Time: Pleading. Plaintiff's loss of time in attending his wife, while suffering from her injuries, was a proper element of damage, and, where the evidence was received on that question without objection, it is too late, after verdict, to raise the question that such loss of time was not averred in the petition.

Appeal from St. Charles Circuit Court.—*Hon. E. M. Hughes*, Judge.

AFFIRMED.

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Boyle, Priest & Lehmann and *Crawley, Jamison & Collet* for appellant.

(1) There was no evidence that any medicines for plaintiff's wife had been bought or paid for, and the court committed error in submitting to the jury that element of damage in the instruction. McLean v. Kansas City, 81 Mo. App. 72. (2) The testimony of plaintiff and that of the physician, which was the only testimony on the subject of medical services, shows that the physician's bill was for $250.00 and was secured by a note, due after the trial, which had not been paid. The doctor said that his charges were $250.00, but neither he nor any other witness testified to the reasonableness of the charge, nor was there any testimony offered concerning the value of his services. Plaintiff testified that he was out, in actual cash money, about $310.00, but he included the $250.00 note in that estimate. The jury was not required to find, nor was there any evidence from which they could find, that the amount of the doctor's bill, to be paid after the trial, was reasonable. The reasonableness of the charge is a fact to be determined by the jury from the evidence, as any other fact in the case. Duke v. Railroad, 99 Mo. 347; Smith v. Railroad, 108 Mo. 251; Morris v. Railroad, 144 Mo. 500; Robertson v. Railroad, 152 Mo. 382; Rhodes v. City of Nevada, 47 Mo. App. 499; Culbertson v. Railroad, 50 Mo. App. 556; State ex rel. Rogers v. Gage Bros. & Co., 52 Mo. App. 464. (3) Said instruction is further erroneous in directing the jury to include in their verdict "the reasonable value of his time, expended by him in necessary and personal care and attention" to his wife after her injury. The petition specifies minutely and at length all of the items of damage for which plaintiff asks compensation, but the value of his time lost in attending his wife is not included in his demand. Mabrey v. Gravel Road Co., 92 Mo. App. 606-607; Wolfe v. Su-

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preme Lodge, 160 Mo. 675; Price v. Railroad, 72 Mo. 414; Glass v. Gelvin, 80 Mo. 297; Null v. Railroad, 97 Mo. 68; Tetherow v. Railroad, 98 Mo. 74; Bender v. Dungan, 99 Mo. 126; Squire v. Brewing Co., 90 Mo. App. 462.

Barclay & Fauntleroy and *Richard F. Ralph* for respondent.

(1) The entire facts in evidence and the proof (admitted without objection) of $4 of expense, incurred by plaintiff by reason of his wife's injury, and not otherwise accounted for, warrant the inference that said item of expense was for medicines, under the rulings in Missouri that where proof of certain facts of injury or damage fairly permit the inference of other features of such injury or damage the latter may properly be inferred from the former. Dunn v. Railroad, 81 Mo. App. 41; Mabrey v. Road Co., 92 Mo. App. 596; Butts v. Bank, 72 S. W. 1083; Moore v. Railroad, 73 Mo. 438. (2) This case falls directly in reach of the rule laid down by the Supreme Court to the effect that an erroneous instruction as to the elements of plaintiff's damage is not reversible error if the damages awarded are reasonable in amount. Sherwood v. Railroad, 132 Mo. 339. (3) For stronger reason than the one given in the last cited case, a verdict for less than the amount of actual damages proved by undisputed evidence could not properly be held erroneous on the flimsy contention that another item of damage, not mentioned expressly in the evidence, was inadvertently referred to in an instruction. Link v. Prufrock, 85 Mo. App. 618. Blewett v. Railroad, 72 Mo. 584; Brandon v. Carter, 119 Mo. 572; Farris v. Railroad, 51 Mo. App. 297; Heil v. Railway, 16 Mo. App. 363. (4) Where evidence is admitted without objection, even if it be of damages or other facts which should be specially alleged, the want of an objection makes the proof admissible, and there is then

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nothing to form the basis of a reversal. Only exceptions taken to evidence at the trial are reviewable on appeal. Evidence which is not objected to is before the court for any proper use it may have as proof. R. S. 1899, sec. 864; Mellor v. Railroad, 105 Mo. 462; Lumber Co. v. Rogers, 145 Mo. 445; Faber v. Railroad, 139 Mo. 272; Freiermuth v. McKee, 86 Mo. App. 64; Caris v. Nimmons, 92 Mo. App. 66. (5) Where a note is received as payment of a demand, by consent of the parties, it then constitutes evidence of payment as between them. Block v. Dorman, 51 Mo. 31; Rich v. Dudley, 34 Mo. App. 383; O'Bryan v. Jones, 38 Mo. App. 90. (6) Testimony of the price paid for personal property is prima facie evidence of its reasonable value; and the same principle applies to the payment of a bill for services rendered. The payment as aforesaid by plaintiff of the bill rendered by the doctor for his services is evidence of the reasonable value thereof on the theory of law just stated. Campbell v. Woodworth, 20 N. Y. 499; Hoffman v. Conner, 76 N. Y. 124; Hawner v. Bell, 141 N. Y. 140. Those propositions are both decided and assumed in many decisions of our own courts. Craighead v. Wells, 21 Mo. 408; Robertson v. Railroad, 152 Mo. 390; Culberson v. Railroad, 50 Mo. App. 560; Keiser v. Gammon, 95 Mo. 217; Stevens v. Springer, 23 Mo. App. 375. (7) The value of time necessarily given in attending upon one's wife because of the negligence of defendant is a legitimate item of damage, and if admitted without objection, it is wholly immaterial whether the petition specifically charged this item or not, as it is clearly within the general demand of three thousand dollars for the total damages to plaintiff. General allegations of damage or of negligence are sufficient if evidence thereof (which might require special allegation) comes in without objection made at the time it is introduced. Smith v. St. Joseph, 55 Mo. 459; Blair v. Railroad, 89 Mo. 339; Dlauhi v. Railroad, 139 Mo. 291; Chouquette v. Railroad, 152 Mo. 257. (8) Unless ob-

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jection is made when evidence as to damages is admitted at the trial, it is immaterial whether such evidence shows that expenses which constitute the damages were paid by plaintiff or were merely incurred by him as a liability. Hannon v. Transit Co., 78 S. W. 138; Gorham v. Railroad, 113 Mo. 408; Flanagan v. Railroad, 83 Iowa 639.

GOODE, J.—This plaintiff obtained a judgment for $500 against the defendant for personal injuries sustained by his wife in being thrown from the running board of a car by the negligent starting of the car as she was in the act of alighting. The only point made against the validity of the judgment is that the jury were erroneously instructed as to the measure of damages. The instruction of which complaint is made is this one:

"The court instructs the jury that if, under the evidence and the other instructions, you decide to find for the plaintiff, you should assess his damages at such sum as you find from the evidence to be a reasonable compensation to him for any loss of services and of the society (that is to say, of the companionship) of his said wife, and for the reasonable value of his time expended by him in necessary personal care and attention to her, if any, which you may find from the evidence have been caused to plaintiff as direct results of said injury to plaintiff's wife, as well as for such expenses as you may find from the evidence plaintiff has necessarily incurred in taking care of his wife (from the time she was disabled to the present time) on account of the injuries she directly sustained, if any, in consequence of the injury complained of, including therein compensation to plaintiff for such necessary expenses, on account of the reasonable value of medical services to, and medicines for, her, as you may find from the evidence plaintiff may have paid, or become liable for in consequence of said injury to his said wife."

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The first ground on which that direction is attacked is that there was no evidence plaintiff paid for any medicines for his wife, while she was under treatment for her injuries, and it was, therefore, erroneous to allow the jury to take account of the cost of medicines in estimating the damages. So far as we have gathered in an attentive perusal of the testimony, no witness testified in opposition to the testimony for the plaintiff as to the extent of the loss he sustained by his wife's injuries, and the only controversy that can be raised as to the amount of his damages is that different inferences could be fairly drawn from the testimony of the plaintiff and his witnesses as to their amount. Mrs. Abbitt's jaw was fractured, her left arm broken and she received other injuries by her fall. In consequence of the accident she was kept in bed for weeks and her arm was treated by a physician for from four to six months. Plaintiff was compelled to desist from his employment, for which he was receiving $25 a week, to give her attention. He did this on the advice of her physician, who considered her condition so critical that it was necessary for her husband to be with her, as she was in an advanced stage of pregnancy. Besides, he had to employ a nurse for her during eight weeks and a servant to do the housework, which she was accustomed to do.

Plaintiff testified to the following estimate of his damages:

"1. $3.50 per week for eight weeks paid to Miss Sylvia for nursing his wife	$ 28.00
2. $3.50 per week for Miss Sylvia's board for that period	28.00
3. $25 per week for eight weeks time lost by plaintiff while nursing his wife	200.00
4. An average expense of $1.25 per week for a period not stated, paid girl to do the housework formerly done by his wife (31 weeks).	38.75

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5.	A loss of $12 a week in his earnings, beginning nine weeks after the accident and lasting to the date of the trial (22 weeks)	264.00
6.	A note for $250 in full for physician's services, due June 1, 1903, about three months after date of trial	250.00
	Total........................	$808.75

The verdict was for but $500, though no testimony was adduced to disprove the expense and loss plaintiff said he had sustained.

To reverse the judgment we must not only find error was committed, but that the error was not palpably harmless to the appealing party. We do not think the judgment ought to be reversed, even granting the court made a mistake in instructing the jury to allow the cost of any medicines which they believed from the evidence the plaintiff had purchased for his wife; for the evidence is conclusive that plaintiff's other items of loss and expense exceeded the award, and it is incredible that the jury allowed more than a trivial sum, if anything, for medicines. Sherwood v. R. R., 132 Mo. 339.

The instruction is further complained of on the ground that there was no testimony that the doctor's bill was reasonable. Mrs. Abbitt was attended by Dr. B. J. Ludwig, a regular physician and a graduate of a reputable medical school. He testified that his bill for attending plaintiff's wife was $250, and that plaintiff gave him a well-indorsed note, but had not at the time of the trial, paid him in cash. There was no testimony that the charge was reasonable, but the presentation of the bill and its payment or settlement by note or otherwise, was some evidence that it was reasonable. In the absence of other evidence, cost is competent as tending to show value. Abbott's Trial Brief, p. 600, and citation. We can see no reason why that principle of law is not applicable to the cost of medical services as well

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as of property. We have examined the Missouri cases in which there were reversals because of a lack of proof as to the value of medical attention, and in all of them there was no proof at all as to what was charged or paid. The opinions, while they do not pass on the question, appear to assume that the presentation and payment of a physician's bill would be evidence of its reasonableness.

Further objection is made to the instruction that it allowed a recovery for the reasonable value of the plaintiff's time while he was at home attending his wife, although the petition did not allege loss of time, nor ask for special damages on that account. The lack of such an averment in the petition would have been good reason for objecting to the admission of evidence to show plaintiff lost time, or the value of the time he lost; but evidence on that question was received without objection and was, therefore, for the consideration of the jury; and the loss of time when proven, constituted an element of damages to be compensated. If an objection had been made during the trial, the petition could have been amended. Chouquette v. Railroad, 152 Mo. 257; Dlauhi v. Railroad, 139 Mo. 291; Mellor v. Railroad, 105 Mo. 462; Neibhur v. Schryer, 35 N. Y. 615.

The verdict of the jury in this case fell below the damages which the evidence, by any reasonable inference, showed the plaintiff was entitled to receive.

The judgment is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

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SCRIBNER et al., Respondents, v. SMITH, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **SCHOOL DISTRICT.** Where a schoolhouse was used for various public purposes besides keeping school in it and the people of the neighborhood, at an entertainment given for the purpose, raised a fund to buy articles of furniture for the school house, and placed the fund in the hands of a committee to make the purchase, the school district had no right or interest in the fund.

2. ———: **Trustee of Express Trust.** The persons composing the committee were trustees of an express trust and authorized to sue one in whose charge the money had been placed and who refused to turn it over.

Appeal from Douglas Circuit Court.—*Hon. G. W. Thornsberry*, Judge.

AFFIRMED.

Boone & Orr for appellant.

The school district being the real party in interest the suit should have been instituted in its name, and the respondents can not maintain this action. School District v. Smith, 90 Mo. App. 215; State to use of Public Schools v. Crumb, 157 Mo. 545. The government in control of a school district is vested in the board of directors, and they have the sole power to act in behalf of the district. R. S. 1899, sec. 9759.

GOODE, J.—School District No. 104 is in Douglas county adjoining the Christian county line. The citizens of the neighborhood, residing both in Douglas and in Christian counties were accustomed to the use of the school house for prayer meeting, singing school and other assemblies, after the manner of the country side.

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They were inconvenienced at those meetings by a lack of lights, heat and a bell. The house was lighted by lamps the people took from their homes to the school house. To provide the school house with a stove, lamps and a bell, an entertainment was organized by the citizens called a "box supper," at which a fund amounting to $14.45 was raised by the sale of refreshments. By a vote of the meeting the fund was devoted to the purchase of the articles mentioned and these plaintiffs were appointed, by a vote, a committee to take charge of it and look after the purchases. The money was put into the hands of the defendant Smith, who is a merchant of the vicinity. Smith was to hold it as "treasureman," one of the witnesses swore; but it was to be subject to the order of the plaintiffs and spent by them for the specified articles, as Smith himself testified. When the plaintiffs demanded the money of him to make the purchases, he refused to give it up on the ground that it ought to be spent in providing the articles for a new school house which had been contemplated, instead of the old one. This action was brought by the plaintiffs to recover the fund.

We find but little conflict in the testimony; none in fact, except Smith's version that the money was to be used to buy articles for a new schoolhouse; which had been thought of, but as we gather, is not to be built soon. The only point made for a reversal of the judgment is that the plaintiffs had no right to sue; that the cause of action was in the board of directors of the school district. The case originated before a justice of the peace and is here on a full transcript of the record. A motion to dismiss was made in the justice's court, but not on the ground that plaintiffs had no right of action; but because one of them, Boston, is a non-resident of Douglas county. That fact, of course, had nothing to do with his right to sue. It is plain that the school district and the board of directors have no interest in this matter.

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It was a neighborhood affair purely, and the defendant Smith himself lives in Christian county.

We think the plaintiffs have the right of action as trustees of the fund, which was simply deposited with Smith, as he swore. They may be regarded as trustees of an express trust. R. S. 1899, sec. 541. The observations of this court in Kuehl v. Meyer, 35 Mo. App. 206, 42 Id. 472, 50 Id. 648, are in point. See also, Colley v. Wilson, 86 Mo. App. 396; Harris v. Wilson, Id. 406.

The merits of the case are altogether with the plaintiffs and the judgment is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

McCORMICK HARVESTING MACHINE COMPANY, Appellant, v. HILL, Respondent.

St. Louis Court of Appeals, February 16, 1904.

1. **ERROR SELF-INVITED.** Where a party acquiesces in an instruction to the jury, which presents an erroneous theory of the case, he can not be heard to complain of the error on appeal.

2. **JUSTICE COURT: Counterclaim: Dismissal of Plaintiff's Action.** Under sections 3937 and 4009, Revised Statutes of 1899, where an action was brought before a justice of the peace and a counterclaim was filed by defendant, and the plaintiff afterwards dismissed his cause of action, the justice had jurisdiction to proceed to trial on the counterclaim as did also the circuit court to which the case was appealed.

3. **PRACTICE: Motion in Arrest.** Objection may be raised by motion in arrest that the petition or other pleading on which a party has obtained affirmative relief, fails to state a cause of action, and this applies to a counterclaim filed in an action which originated before a justice of the peace.

4. **REPLEVIN: Counterclaim.** In an action for possession of personal property, the plaintiff's demand for possession may be opposed by any defense which goes to defeat his right; and if, in addition to the possession of chattels, the plaintiff asks damages for their detention, whatever defense will defeat or diminish his

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recovery of damages ought to be allowed, whether it be a defense in the nature of a set-off, counterclaim or defensive matter in the strict sense of the words.

5. ———: ———. And with a view to settling all controversies in one action, where possible, a counterclaim in a replevin suit may be enforced to the extent of granting affirmative relief to the defendant by judgment in his favor for an amount above what is found due to the plaintiff, as a separate cause of action in defendant's favor, and not merely as a matter of defense.

6. ———: ———: Subject of Action. In an action of replevin for the recovery of animals under a chattel mortgage which secured a note given in payment for machinery, the subject-matter of the action was the alleged indebtedness secured by the mortgage, and a counterclaim filed by defendant for the value of the machinery returned to the plaintiff was sufficiently connected with the subject-matter of the action to enable him to maintain it.

Appeal from Ozark Circuit Court.—*Hon. G. W. Thornsberry*, Judge.

AFFIRMED.

Green & Clark for appellant.

Defendant's answer to plaintiff's statement before the justice of the peace, was not a counterclaim, and could not preclude plaintiff from dismissing its suit against defendant. R. S., sec. 605 and sec. 4499; Heman v. McNamara, 77 Mo. App. 1; Zerbe v. Railroad, 80 Mo. App. 414.

GOODE, J.— The plaintiff sold the defendant a wheat binder or harvesting machine for $130, for the purchase price of which defendant gave plaintiff three promissory notes, secured by a chattel mortgage on two horses and two cows. Defendant subsequently made a payment of $42 on the notes and still later delivered the binder to the plaintiff with an understanding which is in dispute. Plaintiff says it was to take the binder and

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credit its value as a second-hand machine on the notes; the defendant says the agent of the plaintiff came to him and demanded the machine, saying he had authority to take it; that defendant told the agent if he had that authority he would have to take it and thereupon gave the machine to the agent; that he supposed the company wanted the machine in place of the debt, and there was no understanding as to the exact credit to be allowed for it on the indebtedness. It is very clear from defendant's own statement that he voluntarily relinquished possession of the machine.

This is an action of replevin which was instituted December 31, 1902, by the plaintiff before a justice of the peace to recover possession of the horses and cattle embraced in the chattel mortgage. The statement filed before the justice described the animals and alleged that they were wrongfully detained by the defendant, with other appropriate averments, and prayed judgment for possession of them and $44 damages for their detention. The defendant filed an answer containing a general denial and also a counterclaim. In the latter he averred that he had theretofore purchased of the plaintiff a wheat binder for $130 and had executed his three promissory notes for the purchase price, secured by a mortgage on the horses and cows sued for by the plaintiff; that he had paid forty-two dollars on the notes; that the plaintiff, without legal process, took possession of the binder on December 26, 1902, for the purpose of applying it on said indebtedness; that it was of the value of $125; that defendant had therefore overpaid plaintiff in the sum of $37, for which plaintiff was indebted to defendant. He prayed judgment for the sum overpaid and twenty-five dollars which he averred he had been damaged by the replevin suit.

It should be stated that the horses and cows were not taken from the defendant's possession and he was not, of course damaged by the replevin action, except the amount of the costs he incurred in defending it.

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The plaintiff dismissed its action, the justice heard testimony, found that the right of possession of the property was in defendant at the commencement of the action, adjudged that the plaintiff take nothing by the suit, that the defendant recover possession of the property described in plaintiff's statement, the costs of the action, and found "for the defendant on his counterclaim in a sum equal to plaintiff's demand." From the judgment plaintiff appealed to the circuit court of Douglas county, and filed in that court on February 13, 1903, a replication to the counterclaim which the defendant had filed before the justice. It is as follows:

"Plaintiff for reply to defendant's answer admits that its interest in the property described in complaint is by and through a chattel mortgage, as set out in the answer of defendant; admits the payment of forty-two dollars on the indebtedness, as set out by the defendant; admits that the wheat binder was turned over to plaintiff to be applied on the payment of indebtedness of the defendant; but plaintiff denies that said binder is worth the sum of one hundred and twenty-five dollars, and alleges and avers that said binder is not worth exceeding thirty dollars, for which amount plaintiff is willing to give defendant credit; and plaintiff alleges and avers that with the cash credit as aforesaid, and the binder at thirty dollars, there is still due plaintiff eighty dollars on said indebtedness. That said sum is due and unpaid and the conditions of said chattel mortgage have been broken and plaintiff is entitled to the possession of the property therein described.

"Plaintiff further replying denies each and every other allegation in said answer contained."

A jury trial was had in the circuit court on the issues thus joined. Practically all the evidence taken during the trial related to the value of the harvesting machine at the time it was surrendered by the defendant to plaintiff's agent. At the conclusion of the evi-

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dence plaintiff's counsel prayed the following instruction, which the court gave:

"The court instructs the jury that the only issue in this case is the value of the machine and the burden of proof is on the defendant to show its value."

The court gave this instruction on its own motion, but without objection or exception by the plaintiff:

"You are instructed to find for the defendant in whatever amount the evidence shows the machine was worth at the time plaintiff took it."

The jury returned a verdict in favor of the defendant in the sum of $87.50. A motion for a new trial was filed which set out that the verdict was against the law, against the evidence and was excessive. A motion in arrest was also filed, which states these grounds: "First. Because the defendant's cause of action was dismissed in the justice's court and no judgment can be rendered therein in this court. Second. Because, on the record, there is nothing on which to base the judgment."

Those motions were overruled, exceptions saved, and an appeal taken to this court.

The foregoing statement shows that the case took a very singular course and was tried in the circuit court as though the defendant ought to recover damages for the unlawful conversion of the machine by the plaintiff. It is palpable that no such cause of action existed in favor of the defendant; for, according to his own evidence, and one might say, his own pleading, he relinquished the machine voluntarily in order that it might be applied in either total or partial payment of his notes. The answer, in demanding credit for the value of the machine, treats the taking of it by plaintiff as an act assented to; for if it was tortiously taken no payment could be asserted on such an act, but only a demand for damages. The answer averred that the machine when taken was worth $125 and asked a credit for that amount on account of having turned it over to the plaintiff.

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There was evidence to show that it was worth less than $125 and some testimony that when it was surrendered its value did not exceed $30, the sum for which plaintiff was willing to allow a credit on the notes. That it was taken from the defendant's possession with his consent, appears from the fact that after he had surrendered it to the agent of the Harvesting Company, he (defendant), agreed to let the machine remain on his premises for the time being and to take care of it for the plaintiff. With these facts in proof, there can be no doubt that the judgment against the plaintiff for the full value of the binder, without taking into consideration its claim against the defendant for the unpaid balance of the purchase price, was unjust. In fact, the defendant's counterclaim only demanded judgment for $37, which was the excess he averred he had paid on his indebtedness to the plaintiff. It is true he asked $25 damages on account of this action; but manifestly, he was entitled to nothing, as he was not damaged at all; since the property sought to be replevied was not taken from him. Besides, no testimony was offered to support that demand. Defendant should have had judgment for but $37 at most; but he got judgment for fifty dollars more than that; the plaintiff acquiescing in the instruction to the jury to return a verdict for the defendant for the value of the machine. The error committed was, therefore, self-invited by the plaintiff and can not be complained of on appeal. That ruling of the court was matter of exception and no exception was saved during the progress of the trial.

With the case in the posture stated, plaintiff must look for relief to errors apparent on the face of the record and assigned in its motion in arrest. The first of those assignments is that the dismissal of the replevin action by the plaintiff operated to dismiss the defendant's counterclaim and terminate the magistrate's jurisdiction of the cause. The right to file a counterclaim in an action before a justice of the peace is coextensive

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with the same right in the circuit court, except that equitable counterclaims can not be filed before a justice nor such as exceed in amount the jurisdiction of a justice's court. R. S. 1899, sec. 3937. It is further provided by statute that if a counterclaim or set-off is filed before a plaintiff has dismissed or withdrawn his action, the defendant shall have the right to proceed with the trial of his claim and have judgment thereon if he establishes it by evidence. R. S. 1899, sec. 4009. By virtue of those statutes, the dismissal of plaintiff's action did not deprive the defendant of the right to proceed on his counterclaim, if a counterclaim lies in an action of this kind. We will immediately investigate that legal question and also whether the present counterclaim presents facts sufficient to constitute a cause of action. Granting that a counterclaim may be filed in a case like this, the dismissal of plaintiff's action did not necessarily carry the counterclaim with it, nor deprive the court of jurisdiction to hear evidence and give judgment thereon. Whether a justice can try a counterclaim after a plaintiff has dismissed his case is not a jurisdictional question. The justice's course in proceeding to try this defendant's counterclaim was at most an error, and not void as beyond his jurisdiction. A justice of the peace has jurisdiction of replevin actions of the magnitude of this one, and also of counterclaims for the amount demanded by the defendant, and a circuit court has jurisdiction of such an appeal. When the case reached the circuit court, the plaintiff made no motion against the right to proceed on the counterclaim on the ground that the main case had been dismissed below; but filed a replication joining issue on its averments, and then proceeded to trial on the issues thus joined. Unquestionably both the magistrate and the circuit court had jurisdiction and power to give judgment on the counterclaim. We must overrule the first assignment of error, which is that no judgment could be ren-

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dered giving affirmative relief to the defendant after plaintiff had dismissed its case.

Plaintiff's other contention against the validity of the judgment is that there was nothing in the record on which it could be based. This assignment goes to the validity of the counterclaim, both as to the right to prefer such a demand in an action of replevin and as to the sufficiency of the facts stated to constitute a cause of action against the plaintiff. The law is that the objection may be raised by motion in arrest that a petition, or other pleading on which a party has obtained affirmative relief, fails to state a cause of action; and if this is found to be true, the judgment must be reversed. McCarty v. Bryan, 137 Mo. 584; Burdsall v. Davies, 58 Mo. 138; Salisbury v. Alexander, 50 Mo. 142; Langford v. Sanger, 40 Mo. 160. A motion in arrest will lie whenever a general demurrer would lie to the pleading. Hart v. Harrison Wire Co., 91 Mo. 414.

The present litigation originated in a justice's court, where the rules of pleading are less exacting than in a court of record. Still, the statutes require a set-off or counterclaim presented in a justice's court to be stated. Stephens v. Barber Supply Co., 67 Mo. App. 587; Gantt v. Duffy, 71 Mo. App. 91; West v. Freeman, 76 Mo. App. 96. And, of course, the statement must contain facts to show the claimant is entitled to the relief asked. Iba v. Railroad, 45 Mo. 469; Dahlgren v. Yocum, 44 Mo. App. 277.

From the above considerations and adjudications it results that if a general demurrer could have been successfully interposed against the defendant's counterclaim, plaintiff's motion in arrest should have been sustained and the circuit court committed error in overruling it.

We will first inquire concerning the right to seek relief by way of set-off or counterclaim in actions of replevin, and under what circumstances the right may be

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exercised, if at all. And on this proposition we find the decisions are divergent.

Mr. Pomeroy in his work on Code Remedies, states the rule generally that a counterclaim is not permissible in such an action save under "exceptional circumstances." Section 767 (3 Ed.). And again he says that in such a case the controlling question would be whether the counterclaim had such a relation to the plaintiff's cause of action that a recovery on it would defeat or modify the relief the plaintiff would otherwise obtain. He asks when a counterclaim will lie for money in an action to recover possession of chattels, and answers that under certain circumstances a counterclaim is proper, citing authorities on the question, and concluding that their result is that "a cause of action on contract for money may so arise out of the transaction which was the foundation of the plaintiff's claim, that it can be interposed as a counterclaim in an action brought to recover the possession of chattels." That doctrine allows a counterclaim in an action for the possession of chattels in so far as it tends to defeat a plaintiff's demand; but does not assert that affirmative relief may be obtained by a defendant on his counterclaim. It will not be gainsaid that where a party is asking judgment against another for the possession of personal property, the plaintiff's demand for possession may be opposed by any defense which goes to defeat his right; and if, in addition to possession of the chattels, the plaintiff asks damages for their detention, whatever defense will defeat or diminish his recovery of damages ought to be allowed; whether it be a defense in the nature of a set-off or counterclaim or defensive matter in the strict sense of the words. Lindley v. Miller, 67 Ill. 244; Hudson v. Snipes, 40 Ark. 75; Baldwin v. Burrows, 95 Ind. 81; Cobbey, Replevin (2 Ed.), secs. 791 to 795. If the right to possession is asserted by virtue of a lien, as in the present case, the defendant may plead a discharge of the lien by payment of the debt it secures, and

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by overpayment. Proof of overpayment would be available to defeat a plaintiff's possessory action for chattels by showing he had no right to the property demanded, even though it might not authorize a judgment in the defendant's favor for the excess paid. By this rule, which is universally followed, it was competent for the defendant Hill to plead and prove that he had overpaid the notes secured by the chattel mortgage on which the Harvesting Company's possessory right to the animals in controversy was founded, both in order to prevent their being taken out of his hands and to defeat the plaintiff's demand for damages for their unlawful detention. In so far as the payments went to discharge the notes, they constituted pure matter of defense; but in ordinary actions the excess would be matter of counterclaim. Now, after the plaintiff dismissed its action of replevin, the defendant did not need to prove defensive matter and the case should have ended with a judgment in his favor for the possession of the stock, and for the costs, unless he was entitled to go further and get affirmative relief.

We have looked into many decisions on the question of obtaining such relief in replevin cases, in order that their bearing on the decision of the present case may be deduced, and will subjoin them under such syllabi as the point in judgment in each one appears to render appropriate. As the rights of set-off and counterclaim are statutory creations, it was to be expected that they would be more liberally regarded as the courts grew to understand the spirit and purpose of the code and appreciate more the usefulness of a liberal construction of the changes it wrought in the common law, not only in conferring these particular rights on litigants, but generally in the rules of pleading and procedure.

Some of the decisions which deny the right of set-off or counterclaim in actions for the possession of personal property, appear to have determined the question, either without a statute on the subject of counterclaim

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to control the court, or without reference to it if one existed. Phillips v. Monges, 4 Whart. 226; Fairman v. Fluck, 5 Watts 517; Williams v. Irby, 15 S. C. 458; Talbott v. Padgett, 30 S. C. 167; Laycock v. Tufnell, 2 Chitty 531; Goslin v. Redden, 3 Harr. (Del.) 21. For a considerable period after the code first authorized counterclaims, in most jurisdictions they were held not to be available in any action for a tort, and, of course, not in replevin, which sounds in tort. Barhyte v. Hughes, 33 Barb. 320; Smith v. Hall, 67 N. Y. 48; Gottler v. Babcock (N. Y. C. C.), note 7 Abb. Prac. 392. Those are all New York decisions, the pioneer State, not only in the adoption of a code of procedure, but in the interpretation of code regulations and alterations. The doctrine that a counterclaim could not be preferred in an action of tort, was repudiated by the New York Court of Appeals in Carpenter v. Ins. Co., 93 N. Y. 553, a case that has been followed since in that State as settling the practice in favor of the allowance of counterclaims in tort actions, within the limits defined by the code. Ter Kuile v. Marsland, 31 N. Y. Supp. 5; Savage v. City of Buffalo, 63 N. Y. Supp. 941; Thomson v. Sanders, 118 N. Y. 252. This doctrine now obtains in most jurisdictions, including Missouri. Kamerick v. Castleman, 23 Mo. App. 481; Ritchie v. Hayward, 71 Mo. 560; Emery v. Railroad, 77 Mo. 339.

There are some decisions in which the right of counterclaim is denied either in replevin alone, or in tort actions generally, on the ground that a State statute expressly or impliedly forbids it. Deitrichs v. Railroad, 13 Neb. 43; Jameson v. Kenn, 43 Neb. 412; Kennett v. Fickel, 41 Kas. 211; Davis v. Frederick, 6 Mont. 301; McIntyre v. Eastman, 76 Iowa 455. The last citation declares the Iowa statute prohibits the filing of a counterclaim in a replevin suit; but this must be a late enactment; for in an earlier decision, the right of counterclaim in such cases was distinctly affirmed. Dunham v. Dennis, 9 Iowa 543.

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Statutes similar to ours in respect to set-off or counterclaim have been construed, in a few instances, not to extend those procedures to replevin actions. Gray v. Robinson, 33 Pacific 712; Loveshon v. Loomis, 45 Cal. 8.

In accordance with Mr. Pomeroy's text, above quoted, the weight of authority appears to favor the right to present a counterclaim or set-off in replevin under some circumstances. There are decisions in which this right was recognized, but in which the facts required it to be enforced only so far as was necessary to defeat the plaintiff's demand; and some of the opinions expressly confine it within that limit. Caldwell v. Pennington, 3 Gratt. 91; Rogers v. Kerr, 42 Ark. 100; Ames Iron Works v. Rea, 56 Ark. 450; Bloodworth v. Stevens, 51 Miss. 475; Lapham v. Osborne, 20 Nev. 168; Baldwin, v. Burrows, 95 Ind. 81; Holderman v. Manier, 104 Ind. 118; Babb v. Talcitt, 47 Mo. 343; Thompson v. Kessel, 30 N. Y. 383. In each of those cases the counterclaim was upheld; but no affirmative relief was granted to the defendant, we believe, and perhaps none was prayed. In other words, the effect of the counterclaim, in the form the judgment took, was purely defensive.

In Baldwin v. Burrows, 95 Ind. supra, there is a dictum that an overpayment can not be recovered by way of counterclaim in a replevin case; but the point was not involved in the decision and the remark appears to be opposed to the reasoning in Gilpin v. Wilson, 53 Ind. 443, and in Shipman Coal Co. v. Pheiffer, 11 Ind. App. loc. cit. 450.

In Babb v. Talcott, a Missouri decision, the action was for the possession of a quantity of wheat and the defendant's retention of the wheat was upheld on the ground that he had a lien on it for warehouse charges. A reply was filed, in the nature of a recoupment, charging that some forty bushels of wheat while in the possession of the warehouseman, were lost through their negligence, causing damage to the plaintiff in an

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amount equal to their charges. That recoupment against the defendants' lien charges in favor of the plaintiff, was approved by the Supreme Court.

In other cases counterclaims in replevin suits were not only sustained, but enforced to the extent of granting affirmative relief to the defendants by judgments in their favor for amounts above the amounts found be due to the plaintiffs. That is to say, the counterclaim in its proper sense as a seperate cause of action in favor of a defendant, and not merely as matter of defense against a plaintiff's case, was enforced in actions of replevin. Roberts v. Johannas, 41 Wis. 617; Aultmann v. McDonough, 110 Wis. 263; Defford v. Hutchinson, 11 L. R. A. (Kas.) 257; Dunham v. Dennis, 9 Iowa, supra; Mayor of N. Y. v. Steamship Co., 21 How. 291; Wilson v. Hughes, 94 N. C. 182; Minn. Threshing Co. v. Daniel, 83 N. W. 266; Cooper v. Kipp, 65 N. Y. Supp. 379. The decisions last cited are exactly in point in the present controversy, as is manifest; for here the defendant not only sought to defeat the plaintiff's action by his counterclaim, but prayed judgment for the excess he had paid over and above what he owed the plaintiff. An examination of the opinions in those cases, which we do not care to digest, will show that they uphold the proceeding by counterclaim for the purpose, not only of defeating a plaintiff's demand for the chattels in dispute, and damages for their detention, but for giving judgment for a defendant for whatever amount the proof shows he is entitled to recover from the plaintiff over and above the claim on which the latter's cause of action is based. Several of them were rendered in actions of replevin wherein the plaintiff's possessory right depended on a chattel mortgage, and the counterclaim was for damages growing out of the transaction incident to the giving of the mortgage; as where the mortgage was put on personal property for its purchase price, and the defendant asked damages because of the inefficient working of machinery, or for the

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breach of some warranty in regard to the property. Aultmann v. McDonough, 110 Wis. supra; Wilson v. Hughes, 94 N. C. supra; Minn. Threshing Co. v. Daniel, 83 N. W. supra. Most of those cases are of recent date and point to a disposition in the courts to adopt a broader view than was formerly taken of the right of counterclaim in actions like this and in actions of tort generally. As opposed to the older notion on the subject expressed in Gottler v. Babcock, supra, that a set-off or counterclaim would not lie in a possessory action for personalty, we call attention to the opinion in Brown v. Buckingham, 11 Abb. Prac. 387, wherein it is said that the code, in general terms and without limitation as to the nature of the action, provides for a counterclaim provided it arises on the transaction set forth in the complaint, or is connected with the subject of the action, and that such language is sufficiently comprehensive to authorize the procedure in replevin, or other tort cases.

In view of the drift of opinion on this subject, and the very liberal construction which has been put on our statutes in reference to set-off and counterclaim with a view to settling all controversies in one action, if possible, we think those remedies lie in replevin actions as well as in others; subject, of course, to such restrictions as the nature of the proceeding, or the facts of the case may impose. This doctrine has been adverted to with approval heretofore in this State (Workman v. Warder, 28 Mo. App. 1), and will be adopted in deciding the present appeal. It leads to the conclusion that a demurrer would not lie against the defendant's counterclaim on the ground that such a remedy is inapplicable to this species of litigation, and that the plaintiff's motion to arrest the judgment can not be sustained on that ground.

The next point for investigation relates to the sufficiency of the facts stated in the answer to constitute a cause of action against the plaintiff. The statutes say that a counterclaim must exist in favor of a defend-

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ant against a plaintiff, between whom a separate judgment might be had in the action. That statutory requirement is met by the facts stated in defendant's answer; for they would authorize a judgment against the plaintiff for any sum he may have overpaid on his indebtedness. Does the asserted counterclaim arise out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or is it connected with the subject of the action? It must fulfill one of those contingencies, as this is not a case on a contract. As is usual in the attempt to settle the meaning of statutory innovations in the law of procedure, there has been a great diversity of opinion as to what is meant by the words "transaction" and "connected with the subject of the action." No transaction is expressly stated in the complaint, except the alleged unlawful detention of the stock by the defendant. But the answer and the replication develop all the facts of the dealings between the parties and show that the plaintiff's interest in the property sued for, grew out of a chattel mortgage which had been executed by the defendant to secure notes given for the purchase price of the wheat binder. The facts on which relief is prayed in the answer are two alleged payments on the notes. The cash payment is admitted by the replication, while the amount of the other, made by the return of the machine, is disputed. Narrowly regarded, the subject of the action may be said to be the animals described in the complaint; and on that theory it could not appropriately be held that the payments averred in the counterclaim are connected with the subject of the action. But back of the complaint with its formal averments, are the debt and the security for it, which are admitted by the plaintiff to be the foundation of its interest in and right to recover the property in suit. The subject of the action is the alleged indebtedness of the defendant to the plaintiff; as would not be doubted if the case was one in equity to enforce the notes and mortgage. And only by the most

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technical and barren logic can it be said to be otherwise in this case, wherein the security is sought to be legally enforced. The overpayment pleaded by way of counterclaim is directly connected with the subject of the action, when thus regarded, and might perhaps be declared to arise out of the transaction on which the notes and mortgage were given. But we prefer to decide that the payments are connected with the subject of the action. The phrase "subject of the action," is different from "cause of action," and signifies the ultimate or primary title, right or interest which a plaintiff seeks to enforce or protect; not merely the wrong to be redressed in the particular case. According to this view, the subject of the action in this litigation is neither the animals mentioned in the complaint, nor their unlawful detention by the defendant; but plaintiff's claim against the defendant on the notes and chattel mortgage. Plaintiff's right to the stock depended entirely on whether its notes had been paid and the lien of the mortgage thereby destroyed; hence, the indebtedness was the subject of the action and its existence the fact in dispute. This interpretation of the law on the subject of counterclaim is generally taught. Bliss, Code Pleading (3 Ed.), sec. 126; Pomeroy, Code Remedies (3 Ed.), secs. 775, 793; Miller v. Hunt, 57 N. W. 315 (Idaho); Murphy v. Russell, 67 Pac. 427 (Idaho); Deford v. Hutchinson; Minn. Thresh. Co. v. Daniel, Aultmann v. McDonough; Wilson v. Hughes; Kamerick v. Castleman; Carpenter v. Ins. Co.; McAdow v. Ross, supra.

In the situation of affairs between the plaintiff and the defendant, the former could have waived the unlawful detention of the mortgaged property and have enforced its security and collected its debt by a direct suit on the contract obligations it held against the defendant; which is a point favorable to the assertion of a counterclaim sounding in contract, when the plaintiff's action sounds *in tort*. Ritchie v. Hayward, 71 Mo. 560;

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Brower v. Nellis, 6 Ind. App. 323. The latter citation has an excellent opinion.

When a counterclaim is tried in a replevin controversy, it will be the duty of the court to carefully supervise the verdict and judgment with reference to compliance with our statutes, which prescribe the judgment that may be rendered against the plaintiff and his sureties when the defendant prevails. R. S. 1899, secs. 3920 *et seq.* The sureties on a replevin bond would not, of course, be liable for any damages found for a defendant on his counterclaim.

We conclude that the answer of defendant stated a good counterclaim within the meaning of the statutes, and that no difficulty in adjusting the respective rights of the parties, which would render it impracticable to deal with the counterclaim, was presented by the facts alleged. If the plaintiff had maintained its action, all their demands could have been determined by the judgment. The cash payment made by the defendant on his notes was $42, and the credit to which he was entitled for the machine was $87.50, as the jury found that was its value when the plaintiff took it back. The sum of these payments is $129.50; so that fifty cents is still due the plaintiff on the notes, exclusive of interest, if they bore interest. Plaintiff was, therefore, entitled to the possession of the property described in the mortgage. There is a balance due on the notes after deducting the $42 paid on them, for which plaintiff can get judgment in an action on the notes and off-set it against the present judgment, which was for the value of the machine only, and adjudicated nothing else.

In the state of the record, the judgment of the court below must be affirmed. It is so ordered. *Bland, P. J.*, and *Reyburn, J.*, concur.

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BIRLEW, Respondent, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, February 16, 1904.

1. **RAILROADS: Crossings on Private Property.** Section 1105, Revised Statutes of 1899, imposes the duty on a railroad company of building crossings for the convenience of proprietors, through whose farm its line runs, and a "crossing" includes not only that portion of the earth's surface immediately by and between the rails, but the approaches on both sides of the track.

2. ———: ———: **Approach to Crossing.** Under section 1105, Revised Statutes of 1899, the owner of a farm through which the railroad right of way runs, after due notice, can recover from the railroad company the cost of constructing a bridge as an approach to a crossing, where the railroad company has already constructed fences, gates, and laid planks on either side of the rails at that point.

Appeal from Shannon Circuit Court.—*Hon. W. N. Evans,* Judge.

AFFIRMED.

L. F. Parker, J. T. Woodruff and *W. J. Orr* for appellant.

J. W. Clilton for respondent.

GOODE, J.—Plaintiff sued for the cost of a bridge he built as an approach to a part of a farm crossing over the defendant's right of way. The agreed facts on which the case was decided are these:

"Plaintiff is owner of lands described in his petition. That in 1888 the Current River Railroad Company constructed its line of road across plaintiff's farm, dividing one eighty-acre tract thereof.

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"That afterwards the Current River Railroad Company conveyed its property to the Kansas City, Ft. Scott & Memphis Railroad Company, which latter company leased said property on the fifth day of October, 1901, to this defendant which, since said date, has operated said railroad.

"That on the second day of June, 1902, plaintiff delivered to defendant's agent at Winona, Misouri, the following notice:

" 'To the Frisco Railroad Company: You are hereby notified that you are required to construct a farm crossing with good and sufficient approaches thereto at a point on your railroad originally called and designated the Current River Railroad about two and one-half miles below (east) your depot at Winona, Missouri, the same being about fifteen feet west of bridge No. 41b, on your said railroad. This part of your road runs through my farm and divides it and such crossing is a necessary one. This second day of June, 1902.

" 'ROBERT BIRLEW,

" 'By J. W. CLHLTON, his attorney.'

"That said right of way through plaintiff's farm is one hundred feet wide and on the north side thereof is a ditch thirty feet wide, which was caused by the original construction of said road.

"That after giving the above notice, plaintiff constructed a bridge across said ditch at the cost stated in his petition, the railroad company having already constructed and maintained lawful fences and gates at said point and laid plank on either side of the rails at said crossing.

"Plaintiff claims that it was the duty of the defendant to construct this bridge, under section 1105, R. S. 1899; while defendant claims that it was under no legal obligation to construct this bridge."

Plaintiff had judgment for the cost of the structure, and defendant appealed.

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This action is founded on section 1105 of the Revised Statutes. We will copy the material parts of the section.

"Every railroad corporation formed or to be formed in this State, and every corporation to be formed under this article, or any railroad corporation running or operating any railroad in this State, shall erect and maintain lawful fences on the sides of the road where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands, with openings and gates therein, to be hung and have latches or hooks so that they may be easily opened and shut at all necessary farm crossings of the road, for the use of the proprietors or owners of the land adjoining such railroad. . . .

"If any corporation aforesaid shall, after three months from the time of the completion of its road through or along the lands, fields or inclosures hereinbefore named, fail, neglect or refuse to erect or maintain in good condition any fence, openings or farm crossings or cattle-guards as herein required, then the owners or proprietors of said lands, fields or inclosures may erect or repair such fences, openings, gates or farm crossings or cattle-guards, and shall thereupon have a right to sue and recover from such corporation in any court of competent jurisdiction the cost of such fences, openings, gates, cattle-guards or repairs, together with a reasonable compensation for his time, trouble and labor in and about the construction of such fences, openings, gates or cattle-guards, or the making of such repairs, together with ten per cent interest per annum thereon from the time of the service or process upon such corporation in such suit: Provided, that before such repairs are commenced, such owner shall give five (5) days' notice, in writing, to the railroad company, by delivering a copy thereof to the nearest section foreman or station agent of such railroad company, that the

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railroad fence needs repairs at a place or point named in the notice, on the lands of such owner.''

There is a clause, too, for the recovery of an attorney's fee, if a proprietor is compelled to go to law to recover an expenditure contemplated by the statute; but we are not concerned with that provision, as plaintiff obtained no relief of the kind.

The defendant made two contentions:

First. That a railroad company, though it is bound to put in a farm crossing when its right of way runs through a man's farm, is not bound to put in an approach to the crossing.

Second. If it fails to do its duty, the owner can not build the approach and get judgment against the railroad company for the expense.

That the statute imposes the duty on a railroad company of building crossings for the convenience of proprietors through whose farms its line runs, is patent on the face of the statute and has been adjudged. Baker v. Railroad, 57 Mo. 265; Sheridan v. Id., 56 Mo. App. 68; Madison v. Id., 60 Mo. App. 599; Stumpe v. Id., 51 Mo. App. 357.

What is the crossing of a railway right of way? Not alone, we think, the boards or other appliances which must be laid beween the rails and adjacent to them on the outside, and cattle-guards and wing fences to keep cattle from straying on the right of way beyond the crossing; but such structures, too, as will enable a wagon or team to go safely and conveniently on the track. This is stated to be the legal definition of the word ''crossing'' in an authoritative treatise on railroad law; and respectable authorities are cited in support of the text. 3 Elliott, Railways, sec. 1097. In contemplation of law, a crossing is not only that portion of the earth's surface immediately by or between the rails of a track; but the approaches on both sides of the track; and it is incumbent on a railroad company to construct approaches needed to make a crossing usable;

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and so courts of authority have decided. People v. Railroad, 74 N. Y. 302; Moggy v. Id., 3 Manitoba 209; Roxbury v. Id., 60 Vt. 121; Gulf, etc., Ry. v. Greenlee, 6 Tex. 344; Connecticut, etc., Ry. v. Claire, 6 Ind. App. 390; Collier v. Railroad, 26 Ga. 611.

In the Vermont case we have cited, the court held the railway company must extend the approaches beyond the right of way if that was necessary to make the crossing practicable.

In Farley v. Railroad, 42 Iowa 234, it was urged by the defendant that an embankment thrown up as a means of approaching a crossing was no part of the latter and that the company was, therefore, not bound to repair it. But the Supreme Court of Iowa expounded the statutory meaning of the word "crossing" to include not merely the ground on which a railway track runs, but the means of getting to the track. This interpretation we think is suitable to our statute; while by the one contended for, a crossing would sometimes be sufficient to satisfy the law, though the track could not be crossed, because it could not be reached.

It will be observed from the stated facts that in constructing the railroad, a ditch was excavated on one side of the right of way; but whether within the boundary of the right of way, or outside, does not appear. Be that as it may, the railroad company dug the ditch, and if it was necessary to build a bridge over it to enable the plaintiff to cross the track, the expense should fall on the company as much as any other expense of the crossing. Of course, a farmer can not demand a crossing where none is necessary, and must be reasonable in his request for such an outlay by a railroad company; and we apprehend that a company could defeat a claim for the expense of a crossing a proprietor had put in by showing that it was not needed, or was put in at a place where the cost was exorbitant when it would have been as useful somewhere else. That is to say, if a dispute should arise between a proprietor and a company

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as to where a crossing should be located, and the company was willing to build at a point where the cost would be moderate, it would be upheld in standing out for that location if it was reasonably convenient for the use of the proprietor. No defense was made in this case on the score that an improper place was chosen by the plaintiff for the crossing in question, and it must be presumed the place was proper.

As to the defendant's second contention, that though it failed to comply with its statutory duty to build the crossing, plaintiff can not recover the expense he incurred in building it, we point to the Missouri decisions cited above as adjudications against the defendant's position.

In this connection an argument is advanced that because the statute enumerates certain items of recovery in such instances, namely; fences, openings, gates, cattle guards and repairs, but does not mention the cost of an approach among the items of recovery, that cost can not be recovered. The language of the section is careless, but it authorizes an owner to build a crossing if the company does not; and it would be unreasonable to conclude the Legislature intended to make the railway company pay for everything except an approach and make a proprietor stand the expense of that. Under the same argument the cost of the planks and gravel needed to enable the rails of the track to be driven over in safety, would have to be paid by a proprietor; for they are not enumerated. There can be no question that the intention was to throw the expense incident to building all parts of a crossing on a railroad company; whether it builds it, or a proprietor does so after its refusal.

The judgment is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

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WILLIAMS, Appellant, v. DeLISLE STORE COMPANY, Respondent.

St. Louis Court of Appeals, February 16, 1904.

LANDLORD AND TENANT: Purchase of Crop: Notice. Under section 4123, Revised Statutes of 1899, a landlord, whose rent has not been paid, may recover against the purchaser from his tenant the value of the crop sold, where the purchaser knows the crop was grown on demised premises, although he had no notice that the rent was unpaid.

Appeal from New Madrid Circuit Court.—*Hon. H. C. Riley*, Judge.

REVERSED AND REMANDED.

Lawrence W. Fisher for appellant.

Instruction numbered 3, for defendant, required the jury to find that defendant had knowledge that the rent sued for was due plaintiff before they could find for plaintiff. This is not the proper construction of section 4123, R. S. 1899. It is only necessary that the purchaser have knowledge that the crop was raised on rented premises, or, that the purchaser have knowledge of facts sufficient to put him on inquiry. Toney v. Goodley, 57 Mo. App. 235.

Robert Rutledge for respondent.

GOODE, J.—This action was brought on section 4123, R. S. 1899, which provides a remedy in favor of a landlord against a party who buys a crop grown on demised premises with knowledge of that fact. The statutory clause which is the foundation of the action reads as follows:

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"If any person shall buy a crop grown on demised premises upon which any rent is unpaid, and such purchaser has knowledge of the fact that such crop was grown on demised premises, he shall be liable in an action for the value thereof to any party entitled thereto, or may be subject to garnishment at law in any suit against the tenant for recovery of the rent."

It will be observed that the statute gives the action if the purchaser of the crop knew it was grown on demised premises.

This plaintiff had leased a tract of land in Pemiscot county to a tenant by the name of Madeax for the year 1900, at $3 an acre. The rent fell due January 1, 1901, and was not paid. During that month Madeax hauled some of the cotton he had raised on the leasehold to the town of Portageville, where the defendant company kept a store, and sold the cotton to the defendant. There is evidence from which it may be reasonably inferred that the officers of the company knew the cotton had been raised on the demised premises. In fact, they virtually admitted they did, but said they asked, before buying, if Madeax owed any rent and he declared he did not and that there was nothing against the crop.

The court below gave instructions for the plaintiff which were sound; but committed an error in giving this one at the request of the defendant:

"3. The court instructs the jury that, even if the defendant bought a part of the crop grown upon the leased premises of plaintiff, unless defendant had knowledge of the fact at the time it paid the money to A. Madeax for the cotton bought from him that the same was grown upon leased or demised premises and that the amount claimed by plaintiff herein was for rent due said plaintiff from said A. Madeax for the year 1900, then the finding of the jury should be for the defendant."

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That direction required the jury to find the defendant had knowledge at the time it paid Madeax for the cotton, not only that it was grown on leased premises, but that the amount claimed by the plaintiff in this action was for rent due plaintiff from Madeax for the year 1900. The statute attaches no such condition to a landlord's right to recover. It is sufficient for him to show that his rent was unpaid and that the defendant bought the crop, or part of it, knowing it had been grown on demised premises. Plaintiff had a lien on the cotton raised by Madeax for his rent for eight months after the rent fell due (R. S. 1899, sec. 4115) and if the defendant purchased some of it with knowledge that it had been raised on rented land, plaintiff can collect from the defendant the value of what it purchased. Certainly he did not lose his lien because Madeax made a false statement about having paid the rent. Such an interpretation of the statute would place the landlord at the mercy of his tenant. The defendant bought at its peril if it knew Madeax had raised the cotton as a tenant. An instruction like the one copied is contained in the report of the decision in Darby v. Jorndt, 85 Mo. App. 275; but it was given in that case at the instance of the defeated party and was not commented on in disposing of the appeal.

The judgment is reversed and the cause remanded.
Bland, P. J., and *Reyburn, J.*, concur.

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THOMAS HENRY, Appellant, v. LISLIE L. OREAR, Respondent.

Kansas City Court of Appeals, January 4, 1904.

1. **MORTGAGES: Release: Other Debt: Agreement: Evidence.** Though a mortgagor may owe a mortgagee, yet unless the debt is a part of the mortgage debt its non-payment will not excuse the mortgagee from releasing the mortgage upon the payment of the mortgage debt; and there is no evidence in this case of a valid agreement that the additional debt was to be paid before the release occurred.

2. ———: ———: ———: **Pleading: Instructions.** The fact that the mortgagee was not to release his mortgage until the mortgagor had paid an additional debt, is new matter and must be affirmatively pleaded in the answer, and an instruction set out in the opinion was properly refused on the pleadings.

3. ———: ———: **Assignee: Penalty: Statute.** The fact that the defendant is a mere assignee in a note and mortgage for collection will not excuse him from the penalty for failure to release, since an assignee is expressly within the terms of the statute.

4. ———: ———: **Penalty.** Though upon the payment of a given amount a certain part of the mortgaged land had been released, yet the mortgagee is liable for the penalty of ten per cent upon the whole debt if upon full payment he refused to release the remainder of the land.

5. ———: ———: **Parties: Pleading.** A mortgagee who files an answer and fails in the trial court to raise the question that a comortgagor has not been made a party, can not make such point in the appellate court.

Appeal from Sullivan Circuit Court.—*Hon. John P. Butler,* Judge.

Reversed and remanded (*with directions*).

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Harber & Knight and *Childers Brothers* for appellant.

(1) To make out plaintiff's case under the pleadings, he was required to, and proved the following facts: (a) The payment to Orear, the assignee and holder of the note the amount of the deed of trust debt. (b) Payment of the fee for release of the record. (c) The request for release more than thirty days before bringing his suit. Dawson v. Clark, 49 Mo. App. 148; Hanson v. Stever, 69 Mo. App. 136; Dunkin v. Ins. Co., 63 Mo. App. 258; Campbell v. Seeley, 38 Mo. App. 300; Hill v. Wainright, 83 Mo. App. 465. (2) The defendant, Orear, being the assignee and holder of said note, was the party required, under the law, to make the release. R. S. 1899, sec. 4358 and 4363; Ewing v. Shelton, 34 Mo. 518; Collar v. Harrison, 28 Mich. 518; Bergis v. Gibony, 47 Mo. 171; Woods v. Elbridge, 62 Mo. App. 127; Dawson v. Clark, 49 Mo. App. 149; Anson v. Stevens, 69 Mo. App. 136. (3) The plaintiff's first instruction, and the defendant's instruction given submitted to the jury every issue presented under the pleadings. (4) The evidence therefore was not only incompetent under such general issue but the instruction did not require the jury to find that defendant had ever advanced the sixty dollars, or any sum at the request for or even with the knowledge of plaintiff, and the instruction should have required the jury to find that it was advanced for Henry. Northrup v. Ins. Co., 47 Mo. 435; Musser v. Adler, 86 Mo. 445; Meiz v. Glenn, 38 Mo. App. 98; Brooks v. Blackwell, 78 Mo. 309. (5) There is nothing in the answer to warrant the reception of the evidence relative to the sixty dollars commission, and defendant's instruction "A" was simply an attempt to broaden the issues, which has been often condemned. Weddingham v. Hulett, 92 Mo. 528; Wolf v. Supreme Lodge, 160 Mo. 686; DeDonato v. Morrison, 160 Mo. 581. (6) This instruction presented an issue not in the

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pleadings, and was properly refused. Storms v. White, 23 Mo. App. 31; Sones v. Richmond, 21 Mo. App. 17; Larimore v. Legg, 23 Mo. App. 645; Maston v. Frazier, 48 Mo. App. 302; Hoaglin v. Amusement Co., 170 Mo. 335; Weil v. Posten, 77 Mo. 284.

Wilson & Clapp for respondent.

(1) Defendant's instruction "A" properly declared the law—it was error to refuse it. R. S. 1899, secs. 4358, 4363. If Orear was the beneficiary and holder of the deed of trust and Henry still owed him $60, then Orear had not received full satisfaction and there could be no recovery. (2) The appellate courts will not reverse an order sustaining a motion for new trial, if the action of the lower court can be upheld for any of the grounds set out in the motion. Ittner v. Hughes, 133 Mo. 679; Thiele v. Railway, 140 Mo. 335; Hopper v. Hotel Co., 142 Mo. 378; Folding Bed Co. v. Railroad, 148 Mo. 478; Jegglin v. Roeder, 79 Mo. App. 428; Vastine v. Rex, 93 Mo. App. 98; Cohn v. Ins. Co., 96 Mo. App. 315. (3) A penal statute must be so construed that no case will fall within it which is not included within the reasonable meaning of its terms and within the spirit and scope of its enactment. Connell v. Tel. Co., 108 Mo. 459; Dudley v. Tel. Co., 54 Mo. App. 391. And this is a suit for the enforcement of a statutory penalty. Dunkin Ins. Co., 63 Mo. App. 257. (4) A suit for the enforcement of the penalty under the statute can be maintained only by the party aggrieved. R. S. 1899, sec. 4363. In this case the parties aggrieved are Thomas W. and Lela A. Henry. Both were owners of the land, both signed the note and the deed of trust. Neither can maintain a separate action. They must sue jointly. (5) Under the statute the action can only be brought against the *cestui que trust* or assignee receiving full satisfaction. Secs. 4358, 4363, supra. Orear never received one dollar of the

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money paid by Henry on the debt. (6) The statute does not provide for the enforcement of a penalty against one to whom the deed of trust has been assigned, not for value, but for the purpose of entering satisfaction on the margin of the record. Such assignee is merely the agent of his assignor, and the assignor being the one who has received satisfaction is the one to be proceeded against. The statute does not provide for a penalty against an agent. Secs. 4358, 4363, supra.

ELLISON, J.—Plaintiff gave a mortgage to the New England Loan and Trust Company on 620 acres of land in Sullivan county to secure a note of $7,400. The note was assigned to defendant. Plaintiff claimed that he had paid the note in full amounting with interest to the sum of $7,844, together with twenty-five cents recorder's fee for releasing the mortgage on the margin of the record where it was recorded; and that he had demanded its release which defendant for more than thirty days had refused. Plaintiff thereupon brought this suit for ten per cent on the amount of the mortgage as a penalty for failing to release. R. S. 1899, secs. 4358, 4363. He obtained a verdict in the trial court which on motion of defendant was set aside on account of the court concluding that error was committed in refusing the following instruction: "If the jury believe from the evidence that Orear advanced $60 of his own money to make up the total amount of the draft of $7,844 sent to the Trust Company, and that the $60 has never been paid by Henry to Orear, then the verdict of the jury must be for the defendant."

Plaintiff appealed to this court.

It appears that defendant obtained the loan for which the mortgage in controversy was given from the New England Loan & Trust Company of Kansas City, Missouri. That defendant was what the evidence designated as a "loan agent" and that he lived in

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Milan, Missouri, where the loan was negotiated and the mortgage recorded. The note and mortgage appear to have been assigned to parties in New York and were held by them when the money was paid which it is claimed discharged the loan. The evidence shows that payment was made to defendant substantially in the following way: Plaintiff sold 140 acres of the mortgaged land to one Reger for a sum which the parties do not agree upon, but it was near $2,700. That Reger, to pay for it, borrowed of the New England Loan and Trust Company $2,400 through defendant. That that sum was turned over to defendant by plaintiff for payment on the latter's note and at the same time plaintiff gave him his check for $5,444, making a total of $7,840, which he claims to be in full of his note with interest.

Defendant's claim is that there was due him as commission for the Reger loan the sum of $60. How that was treated by defendant is not clear. The theory evidenced by the refused instruction, above set out, is that defendant advanced that much money for plaintiff when he remitted the $7,840 to New York. It may be that plaintiff paid to defendant the proceeds of the Reger sale and just enough more to make the total of what was due on his note and that defendant knowing that $60 was due him and that he did not keep it out of the moneys paid to him, sending it all to the holders of plaintiff's note, considered that he advanced that sum for plaintiff.

1. But be that as it may, it is undoubtedly the law that notwithstanding a mortgagor may owe a mortgagee, yet unless the debt is a part of the mortgage debt, its non-payment by the mortgagor will not excuse the mortgagee from releasing the mortgage upon payment of the mortgage debt. But, assuming that plaintiff could have made a valid agreement with defendant that if the latter would advance $60 for him to the mortgagee, he could hold the mortgage as a lien for that amount, yet there is no pretense of such agreement. There is

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not a particle of evidence to that effect. Having no foundation in evidence, there was nothing upon which defendant could place or fix a right to hold on to the mortgage until the $60 was paid. If plaintiff owes him that sum he is liable to him for it apart from any relation to the mortgage.

2. Furthermore, if there was any such agreement, or any of that nature, whereby the debt of Reger, as commission for his loan, was to become the debt of plaintiff to be paid to defendant and for which defendant was, by some mode, to become entitled to hold the mortgage for it, it certainly was a defense of such affirmative new matter that it should have been specially pleaded as contended by the plaintiff. The answer here being merely a general denial, defendant had no right to make it, or to ask an instruction upon it. In the case of Wiener v. Peacock, 31 Mo. App. l. c. 246, Judge Rombauer said: "We deem it unnecessary to express an opinion on defendant's fourth point, since his answer is a mere *general denial,* and matters of excuse or justification of refusal to enter satisfaction, it would seem should be especially pleaded." 2 Jones on Mort. (3 Ed.), sec. 991; Northrup v. Ins. Co., 47 Mo. 435; Musser v. Adler, 86 Mo. 445; Mize v. Glenn, 38 Mo. App. 98; Brooks v. Blackwell, 76 Mo. 309.

The instruction aforesaid was therefore properly refused by the trial court and its refusal was not good ground upon which to sustain the motion for new trial.

3. Defendant finds additional ground for sustaining the motion in that he was merely assignee of the note and mortgage for collection and that not being in fact, the beneficiary, he is not liable to the penalty imposed by the statute. We think he is. The statute expressly names and includes the assignee within its terms. By the assignment he became the legal owner of the note and was the proper party to release the mortgage. It has been so decided by the Supreme

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Court. Ewings v. Shelton, 34 Mo. 518; Joerdens v. Schrimpf, 77 Mo. 383.

4. Defendant further claims that as the case showed that upon the payment of $2,400 arising from a sale to Reger of 140 acres of the original 620 acres mortgaged, he immediately released the 140 acres, the amount of the mortgage or deed of trust money was reduced by that sum and plaintiff is therefore only entitled to the ten per cent forfeiture on the amount of the mortgage after deducting that sum. We do not think so. The forfeiture of "ten per cent upon that amount of the mortgage or deed of trust money, absolutely," as declared by the statute, means ten per cent of the mortgage money without regard to or reduction by partial payments, or releases of portions of the land. The greater part of a mortgage debt might be paid and the mortgagee might, in consequence, release only a small part of the land. The statute does not recognize any variation from its absolute demand that the whole of the land shall be relieved of the lien else a forfeiture of ten per cent of the entire mortgage sum will occur. The object of the statute was to enforce the duty of the mortgagee to clear the title of the mortgagor, so that it became apparent on examination that the incumbrance of record no longer existed. Fink v. Bruihl, 47 Mo. 173. An illustration of the absolute nature of the forfeiture may be seen in Collar v. Harrison, 28 Mich. 518, where the prescribed penalty of $100 was recovered though the mortgage had been reduced below that sum. And where the penalty was exacted for failing to release within the proper time, though it was entered before suit brought. Deeter v. Crossly, 26 Iowa 180. And for failing to make the release upon request in a case where the mortgage had been duly discharged by the judgment of a court. Fink v. Bruihl, supra.

5. The further claim of defendant is that the mortgage and note were executed by plaintiff and his wife. That the wife was a principal in the mortgage and had

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not merely joined in its execution to free her dower. That therefore plaintiff was not entitled to the whole penalty, but that she as a mortgagor was entitled to her portion of it and that she had not been joined in the action as a party plaintiff. It was so held in an action on a statute of this kind in Harris v. Swanson, 62 Ala. 299. But the point can not avail defendant since it was not made in the trial court. There was no plea of misjoinder. The answer, as already stated, was merely a general denial. The question whether the plaintiff paid to defendant the recorder's release fee was determined by the jury.

The order granting new trial will be reversed and cause remanded that judgment may be entered on the verdict. All concur.

GRACE E. MARSH, Respondent, v. KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, January 4, 1904.

1. **JURISDICTION: Courts of Appeal: Amount in Dispute.** When the plaintiff sues for the sum of $4,500 under section 2864, Revised Statutes 1899, which allows a recovery of a stated sum of $5,000, and the defendant denies liability therefor, the amount in dispute is $4,500 and on appeal the court of appeals and not the Supreme Court has jurisdiction.

2. **Statutory Construction: Penal Statutes: Remedial Compensation.** A penal action can not be for less than the penalty given by the statutes, but section 2864, Revised Statutes 1899, is remedial and compensatory as well as penal, and serves as compensation and as a protection against repetition of like wrongs.

3. **———: ———: ———: Action.** When a statute blends a penalty with the measure of damages to the injured party as one claim fixed at a stated amount (in this instance of $5,000), and confers upon such party the right to recover the full sum,

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it leaves such party in control of the action, and he may accept or sue for whatever sum he chooses within the amount fixed by the statutes.

4. **Contributory Negligence: Driver: Principal and Agent: Vehicle Passenger.** The negligence of a driver can not be imputed to a passenger in the vehicle unless the driver is the agent or representative of the passenger; and in this case there is no such intimation.

5. ——: ——: ——: ——. If a person riding in a vehicle knows the driver is negligent, and takes no precaution to guard against injury, he can not recover for in such case the negligence is his own and not simply that of the driver, and he can not rightfully omit to use care in blind dependence upon another; and the evidence fails to show plaintiff was guilty of contributory negligence.

Appeal from Vernon Circuit Court.—*Hon. H. C. Timmonds,* Judge.

AFFIRMED.

Lathrop, Morrow, Fox & Moore, Cyrus Crane, O. H. Hoss for appellant.

(1) The demurrer to the evidence should have been sustained (a) because the alleged failure to give the signals was not the cause of the accident; (b) deceased's own negligence precluded a recovery. Harlan v. Railway, 64 Mo. 480; Fletcher v. Railway, 64 Mo. 484; Harlan v. Railway, 65 Mo. 22; Zimmerman v. Railway, 71 Mo. 490; Heinz v. Railway, 71 Mo. 636; Purl v. Railway, 72 Mo. 168; Turner v. Railway, 74 Mo. 602-606; Hixson v. Railway, 80 Mo. 335-340; Fox v. Railway, 85 Mo. 679; Kelly v. Railway, 88 Mo. 534-548; Stepp v. Railway, 85 Mo. 229-234; Baker v. Railway, 122 Mo. 533-543; Hayden v. Railway, 124 Mo. 566-573; Weller v. Railway, 120 Mo. 635-653; Kelsay v. Railway, 129 Mo. 362; Loring v. Railway, 128 Mo. 349-359; Huggart v. Railway, 134 Mo. 673-679; Lane v. Railway, 132 Mo. 4; Payne v. Railway, 136 Mo. 562; Hook v. Railway, 162 Mo. 569; Tanner v. Railway, 161 Mo. 572. (2)

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The rules laid down in the foregoing cases are not relaxed because Marsh was not driving the team. Beach on Contributory Negligence (3 Ed.), sec. 115a; Elliot on Railroads, vol. 3, sec. 1174; Dean v. Railway, 6 L. R. A. (Pa.) 143; Township v. Anderson, 114 Pa. St. 643; s. c., 8 Atl. 379; Brickell v. Railroad, 120 N. Y. 290; Smith v. Railroad, 32 Atl. (Maine) 967; Miller v. Railroad, 27 N. E. (Ind.) 339; Smith v. Railroad, 38 Hun 33; Aurelius v. Railroad, 49 N. E. (Ind.) 857; Griffith v. Railway, 44 Fed. 574-580; Railroad v. Boyts, 45 N. E. (Ind.) 812.

J. I. Shepherd and *Scott & Bowker* for respondent.

(1) The court did not err in refusing to sustain appellant's demurrer to respondent's evidence, for under the testimony it was a case for the jury. Weller v. Railroad, 164 Mo. 180; Donahue v. Railroad, 91 Mo. 357; Huxhold v. Railroad, 90 Mo. 548; Kelley v. Railroad, 88 Mo. 534; Johnson v. Railroad, 77 Mo. 546. (2) The presumption of due care always obtains in favor of plaintiff in an action to recover damages for an injury sustained by him through the alleged negligence of another. Weller v. Railroad, 164 Mo. 180; Crumpley v. Railroad, 111 Mo. 152; Bluedorn v. Railroad, 108 Mo. 439; Petty v. Railroad, 88 Mo. 306; Busching v. Gas Light Co., 73 Mo. 219. (3) Deceased had a right under the law to assume that the railway company would perform its duty in regard to giving the statutory signals as it approached the crossing in question. Weller v. Railroad, 164 Mo. 180; Jennings v. Railroad, 112 Mo. 490; Crumpley v. Railroad, 111 Mo. 152. (4) Before the court can declare as a matter of law that the deceased was guilty of contributory negligence the evidence must be substantially one way and not such that reasonable minds might differ with respect thereto. Weller v. Railroad, 164 Mo. 180. (3) Although the driver of the vehicle in which the deceased was riding should be held to be

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guilty of negligence in approaching the crossing in question as he did, his negligence could not be imputed to the deceased, unless said driver was the agent of or under the control of the deceased. Proffit v. Railroad, 91 Mo. App. 369; Dickson v. Railroad, 104 Mo. 491; Beck v. Railroad, 102 Mo. 544; Munger v. Sedalia, 66 Mo. App. 629; Lapsley v. Railroad, 16 L. R. A. 800; Howe v. Railroad, 30 L. R. A. 684.

ELLISON, J.—Plaintiff is the widow of G. W. Marsh who was killed by one of defendant's trains in the village of Hume. She recovered judgment for forty-five hundred dollars and defendant appealed to this court.

The deceased with Willis Harrold and two others, all in Harrold's wagon, had driven into the town to do some shopping. In returning, Harrold and one of the others were on the front seat, Harrold driving, while the deceased and the other man were sitting in the rear on the bottom of the wagon bed. The evidence tended to show that defendant's road runs from north to south through the town and that in approaching the track along the street from the direction these parties were travelling neither the track to the south nor trains thereon could be seen, on account of buildings and other obstructions, at but one place between the business portion of the town and a point between six and twenty feet from the track. That point was two blocks away and then the view was of only a small part of the track. The street along which they drove was smooth so that the wagon did not make sufficient noise to prevent them hearing any signal which an approaching train might make. From the point where they had a view of the track to the south they drove slowly down to within a few feet of the track where they intended to stop and again look for a train. But just as they arrived at that place a fast moving train came from behind the buildings which frightened the horses so that they leaped for-

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ward across the track, throwing the deceased out where he was immediately struck and killed by the engine, the team and other occupants of the wagon escaping.

1. An important point is raised by the defendant as to the jurisdiction of this court to entertain the appeal. The point is based on the statute (Revised Statutes 1899, sec. 2864), fixing the sum of $5,000 as the liability which a defendant must forfeit and pay in a case of this kind. That that being the fixed sum in such case, and that being a sum in excess of our jurisdiction, the appellate jurisdiction is with the Supreme Court.

As has been stated, the amount sued for and recovered was $4,500 and the trial court instructed the jury that if they found for the plaintiff they must find that sum. The same point was made by motion in this court to transfer to the Supreme Court, and with a view of having the question finally determined, we sustained that motion. When the case was received in the Supreme Court plaintiff filed her motion to transfer back to this court, on the ground that this and not that court had jurisdiction. That motion was sustained and the case returned to us. Unfortunately that court did not express its views in an opinion, but we must accept its action on plaintiff's motion as a determination that it had no jurisdiction of the case. Indeed, it is clear that that court could not have determined otherwise. That court has jurisdiction of money demands only "where the amount in dispute, exclusive of costs, exceeds the sum" of forty-five hundred dollars. In sums of forty-five hundred dollars or less the jurisdiction is with this court. The "amount in dispute" in this case is $4,500. For that is the sum plaintiff asserts she has been damaged and which she claims defendant is liable for and for which she asks judgment; and that is the sum for which defendant denies a liability. Plainly, the only "dispute" between the parties as to amount is over the sum of $4,500. Defendant contends that if plaintiff has

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any right to a judgment it can only be for the stated sum of $5,000 named in the statute, and that therefore the amount in dispute must be $5,000. But this contention involves the remarkable necessity of forcing plaintiff into a "dispute" which she specially disclaims.

In our view the point which defendant seeks to make has nothing to do with the intention of jurisdiction. The point simply involves the right of plaintiff to recover at all on a statute naming a fixed sum as the amount to which she is entitled, when she asks a recovery for a less sum. That is, can a plaintiff seeking a judgment under a statute which creates the cause of action and names a fixed sum as the liability, ask for and recover a less sum? Defendant claims that the sum fixed is a penalty and that in suits on penal statutes the petition must be based on the statute as it reads and that the recovery must either be for the sum fixed (no more, no less) or not at all.

In civil actions for what is known as strictly a penalty and based on a strictly penal statute that is the rule. Duffy v. Averitt, 5 Ired. (N. C. Law) 455; Dowd v. Seawell, 3 Dev. (N. C. Law) 185. In the case last cited it was held that the precise penalty must be demanded. The court states in the decision in Cunningham v. Bennett (1 Geo. 1 C. B.) "that a penal action could not be for less than the penalty given by the statute; and though the plaintiff had a verdict, judgment was arrested. I conclude, therefore, that wherever a statute gives a certain sum *in numero*, that exact sum must be demanded; else it can not be taken to be the penalty given by that statute." Such penalties are those which are forfeited to the State in whole or in part and are collected in the name of the State, or an informer authorized by the State.

But the statute on which this action is based is not strictly a penal statute. It is undoubtedly remedial and compensatory, as well as penal. It subserves a double purpose: "first, compensation and, second, as a penalty

to protect the public against repetition of like wrongs." King v. Railway, 98 Mo. 235; Philpott v. Railway, 85 Mo. 164. And when it is not strictly a penal statute, it is not absolutely necessary that the individual who falls under the relief of its provisions should demand the whole sum allowed him. He must, it is true, found his petition on the statute, but he is not compelled to demand all the statute enables him to seek if he is willing to receive less.

It is true that it was remarked in Proctor v. Railway, 64 Mo. 112, 122, that the damages to be recovered under the statute in question were $5,000, "no more and no less." But manifestly the court, in using that language, was merely meaning to say that the sum recoverable was a fixed and definite sum, leaving the jury no discretion as to amount when it was demanded. A discretion the jury would have were the action under another statute. There was no intention to say, and it was not said, that the party entitled to that sum could not sue for nor accept less. Defendant also cites us to Rafferty v. Railway, 15 Mo. App. 559. But that case in no way involves the question presented in the one at bar. That case involved the return of a verdict for a less sum than that demanded and which the court stated should be found if there was a finding for plaintiff at all. That verdict was unasked and was at first repudiated by the plaintiff. The question whether a plaintiff could sue for and accept less than the sum fixed by the statute was not mentioned and, perhaps, was not thought of in the consideration of the case.

That this is not strictly a penal statute is made manifest by some observations on what a penal statute is understood to be; as well as the consequences which would flow from such construction. Penal statutes "are those imposing punishment for an offense committed against the State and which by the English and American constitutions, the executive of the State has the power to pardon." And the suit for such penalty,

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whether civil or criminal, must be in favor of and for the State. Huntington v. Atterill, 146 U. S. 657.

If the action was for a penalty, in the strict sense, it would be local and could not be maintained in the courts of any other State; for it is a fundamental rule of law that the courts of one sovereignty will not enforce the penal laws of another sovereignty. Yet, we know the courts of one State do entertain suits, by the proper parties, for death claims arising under stautes like the one under consideration. Dennick v. Railway, 103 U. S. 11. And we further know that it is the common practice for suits under such statutes to be removed from a State to a Federal court when the citizenship of the litigants meet the proper requirement; a practice which is not allowed in actions for a penalty forfeited to the State. And so a new trial may be granted though the verdict be for the defendant.

The statute of Illinois fixed a penalty of $300 in favor of parents for issuing a marriage license to minor without consent of such parent, 64 Ill. 518, yet it was held that a new trial could be had on motion of plaintiff on the same ground as in ordinary civil actions. Gilbert v. Brown, 79 Ill. 341.

The statute of this State provided that if one sold liquor to an infant the parent could recover a stated sum of fifty dollars, yet this was held not to be strictly penal, but essentially a civil action for damages fixed by the statute, and a bond for costs need not be filed with the petition as would have been necessary if it had been penal. Edwards v. Brown, 67 Mo. 377.

So, there are a number of statutes where, as here, a part of the fixed sum in which the offending party is mulcted is in the interest of the public and wholly outside and beyond the matter of compensation to the party injured, yet when the exclusive right to set the law in motion for the wrong is given to the injured party and the whole sum is his, the statute is not a penal statute in the sense of an offense against the State. It is essen-

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tially a remedial statute, under the terms of which the injured party may, at his election, recover all or any part of what may be allowed him. Among such statutes are those allowing double damages against railways when an injury is done to stock at a point where the track was required to be fenced. Hume v. Railway, 115 U. S. 512. And where double damages are given against a town for an injury on defective walks. Read v. Chemsford, 16 Pick. 128; Reed v. Northfield, 13 Pick. 94. And where double and treble damages are given for specific trespasses. Blewett v. Smith, 74 Mo. 404. In each of these the penalty becomes a fixed sum under the statute the moment the actual damage is ascertained, and yet no one would think that the injured party must demand it all, or else lose all.

In such instances the whole sum is the plaintiff's and it is termed accumulative damages. They bear a likeness to the point we are now considering in this statute. They put a punishment on the defendant in the interest of the public in addition to compensating the injured party. An interesting collection of instances in which a specified sum is forfeited to the injured party to be collected by him at his private suit is set out in Humes v. Railway, 82 Mo. 228-229. They well serve to show the consequences of adopting defendant's theory of this case. This statute giving a fixed sum, is partly in the interest of the public though the whole sum goes to the person supposed to have been damaged by the wrongful act. The damages, in this sense, are accumulative and the statute allowing such party to recover the whole sum, like those in the cases just referred to, is a remedial statute.

A penalty in a fixed sum does not necessarily mean that no other less sum can be recovered. If the penalty is a fixed sum of money, or other stated punishment as an expiration due the State, that specific sum, or that other punishment must be demanded at the suit of the State, for no one is authorized by the State to accept

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less. But if it be a penalty given to an injured party in addition to his damages, it must be intended that it is within his election to exact it all or a part of it, or none at all. So it has been held that a penalty going to the party aggrieved could be compromised by him. Anonymous, Loffts, 155.

If the purpose of the law is solely to punish an offense against the law it is penal in the sense that the sum fixed must be exacted, but if it is to advance a private remedy it is not. And when the purpose is (as in this case) to advance a private right or remedy and there is added thereto a penalty for the individual who has been injured, it is a mere incident to the main right.

So, therefore, we conclude the following to be a proper statement of the law on the head here considered, that is to say: That when the statute blends a penalty with the measure of damages to the injured party as one claim fixed at a stated amount, and confers upon such party the right to recover the *full* sum, it leaves such party in control of the action and he may accept or sue for whatever sum he chooses within the amount fixed by the statute.

2. Abiding by the verdict of the jury we must consider that the defendant's servants neither rang the bell nor sounded the whistle in approaching the crossing where the accident happened. That fact made the defendant guilty of negligence for which it must respond in damages unless it is excused by some negligence of deceased contributing thereto. It is settled that the negligence of Harrold, who was driving the wagon, can not be imputed to the deceased. Becke v. Railway, 102 Mo. 544; Dickson v. Railway, 104 Mo. 491, 504; unless he was the agent or representative of plaintiff of which there is no pretense, since he was merely in company with the driver, being invited by him. Munger v. City of Sedalia, 66 Mo. App. 629. There is no pretense of any identity between the two, or responsibility of the one for the other. Profit v. Railway, 91 Mo. App. 369.

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But notwithstanding this, it is said: "that if the negligence of the occupant contributes with that of the driver and a third person there can be no recovery against the latter." Beach on Contributory Negligence, sec. 115. In discussing the same subject, Elliott on Railroads, vol. 3, sec. 1174, says: "If the person riding in the vehicle knows that the driver is negligent, and he takes no precautions to guard against injury, he can not recover, for in such case the negligence is his own and not simply that of the driver. The plaintiff can not rightfully omit to use care in blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge." And the same rule has been frequently announced in the adjudication of cases involving the question direct. Township v. Anderson, 114 Pa. St. 643; Brickell v. Railway, 120 N. Y. 290; Griffith v. Railway, 44 Fed. Rep. 574; Dean v. Railway, 129 Pa. St. 514; Smith v. Railway, 87 Maine 339; Miller v. Railway, 128 Ind. 97.

And defendant earnestly insists that the evidence disclosed that the deceased was guilty of great negligence in not looking out for himself. That such evidence is so clear and undisputed as to have demanded a declaration, as a matter of law, that plaintiff could not recover.

We have gone carefully over the evidence in this respect and defendant's argument thereon, and find that its contention is without reasonable support. Indeed, the circumstances considered, we fail to find anything justly tending to support the charge of negligence against deceased. There was nothing to show that he had any reason to distrust the care and prudence of Harrold as a driver. He was not with him in the driver's seat, but, as before stated, was in the rear seated on the bottom of the wagon bed. It is not reasonable to expect that he should have the same care of the team that the driver had, or that he should observe every act of the driver, whether of commission or omis-

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sion. There may be instances in which the relation of the parties and their immediate situation at the time of an accident, would render a party injured as culpable as the driver himself. Defendant has cited some such in his brief. But we do not regard this as one of that character. But be that as it may, the question of deceased being guilty of contributory negligence was submitted to the jury and we have the verdict in response thereto. Some portions of the instructions offered by defendant were proper enough, but they were coupled with other matter which rendered them incorrect and they were properly refused.

We are satisfied with the result in the trial court and affirm the judgment. All concur.

ARTHUR W. JOHNSON, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, January 4, 1904.

1. **NEGLIGENCE: Pleading: General Charge.** A general charge of negligence is good unless objection is made at the proper time before the trial, and not after answer at the trial.

2. ———: **Proof of Accident: Explanation.** Plaintiff was in the lower story carting off trash and dirt made by carpenters who were taking up the upper floor. A crowbar fell "on the head and glanced off." It appears the carpenters were prying up the plank at the time. This was proof sufficient to put the defendant on its explanation to show how the crowbar happened to fall. (Cases considered.)

3. **Master and Servant: Fellow-Servant: Statutes: Street Railways.** The follow-servant statute making master of common servants answerable for their negligence to each other applies only to railroads as that word is commonly understood, and has no application to street railways.

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4. ———: **Street Railways: Evidence: Assumption: Pleadings.** Though there is no evidence that defendant is a street railway, the whole case and pleadings are based upon that assumption, and the case will be so treated.

5. **Evidence: Judicial Notice: Kansas City Suburbs.** The courts will take judicial notice that Independence, Missouri, and Argentine, Kansas, are suburbs of Kansas City, in fact, one continuous urban population although the latter suburb is separated by the State line.

Appeal from Jackson Circuit Court.—*Hon. Andrew F. Evans,* Judge.

REVERSED.

John H. Lucas for appellant.

(1) The court erred in admitting any evidence under the pleadings. The petition does not state facts sufficient to constitute a cause of action against the defendant. Ency. Pleading and Practice, vol. 13, p. 907; Waldhier v. Railway, 71 Mo. 516. (2) The court erred in refusing to sustain the demurrer to the evidence offered by the defendant, and in refusing to give the peremptory instruction asked by the defendant at the conclusion of the whole case. There is no evidence of any negligence in this record whatever. Perse v. Railway, 51 Mo. App. 173; Stept v. Railway, 85 Mo. 236; Breen v. St. L. C. Co., 50 Mo. App. 212; Yarnall v. Railroad, 113 Mo. 579-80; Carvin v. St. Louis, 151 Mo. 345; Nolan v. Shiekle, 3 Mo. App. 304-8; Schultz v. Railroad, 36 Mo. 32; McCarty v. Hotel Co., 144 Mo. 402; Sams v. Railroad, 73 S. W. 686. (3) The court erred in giving instruction number one asked by plaintiff, and refusing to give instructions number one and two as asked by the defendant. a. Number one enlarges the issue tendered by the petition. Bank v. Murdock, 62 Mo. 70; Schlereth v. Railway, 96 Mo. 509. There is no evidence on which to base the same. Paddock v. Somes, 102 Mo. 226, and authorities cited and under second subdivision herein.

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Joseph S. Rust for respondent.

(1) The practice in Missouri is not as appellant contends, and besides the petition does not and should not state a negative and a mere conclusion of law, by saying that the carpenters and plaintiff were not fellow-servants. It states facts showing that they were not. It states facts showing that they were not engaged in the same departments of work. (2) The petition also states that "defendant is a corporation owning and operating street and electric railways in Kansas City, Missouri, and between Kansas City, Missouri, and Argentine, Kansas, and Independence, Missouri, and between Argentine, Kansas and Independence, Missouri." It therefore states that defendant is such a railroad as to come within the fellew-servant act, and it shows that the injury was not received in connection with the street railway. The court can not presume that this power-house was used exclusively in connection with its street railway business. The petition was therefore good for that reason. (3) That this petition does not state a cause of action I desire to refer to Pattison's "Missouri Code Pleading," sec. 422, p. 227. The author there says, "While a general charge of negligence is improper pleading and if timely objection is made to it, the plea will be held bad on that account, yet if it is not objected to at proper time and before trial, it is good as a basis of proof. Generality of averment in an action of negligence is not a fatal objection to the petition after answer." In support of the point the author cites Conrad v. De Mont Court, 138 Mo. 311; Foster v. Railway, 115 Mo. 165, and Benham v. Taylor, 66 Mo. App. 308.

ELLISON, J.—This is an action for personal injury received by plaintiff who was an employee of defendant. The judgment in the trial court was for plaintiff.

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The defendant had carpenters employed in the story next above the ground floor of its power-house taking up and relaying floors. Plaintiff, a negro man, was engaged with his horse and cart in hauling out the "trash" made by the carpenters. It appears that the carpenters used, among other implements, a heavy iron bar called a "crowbar" with which they prized up the old floor. This bar fell from the floor above and struck plaintiff "on the head and glanced off." It does not appear from the evidence how it came to fall, or whether it was at the moment being used by the carpenters above. Nor does the petition charge how it happened. The pleader has rested content by simply charging, generally, that defendant's servants negligently caused it to fall.

1. Defendant objected to any evidence being received for the reason stated that the petition made only a general charge of negligence and therefore stated no cause of action. The case of Waldhier v. Railway, 71 Mo. 516, is cited to support the point. An expression is used in that case which supports defendant. But it has never been regarded as authoritative. The point decided in that case was that when a petition charges specific acts of negligence as the ground of action a recovery can not be had for acts not charged. Such was stated to be that decision in Schneider v. Railway, 75 Mo. 295, where it was held in an opinion by the same judge who wrote that in the Waldhier case, that a general charge of negligence was sufficient. And it was so held in Goodwin v. Railway, 75 Mo. 76; Mack v. Railway, 77 Mo. 232; Lemay v. Railway, 105 Mo. 361. In cases later than these, it seems to be held that if there is objection at the "proper time *before trial*" such petition would be held insufficient. Conrad v. De Mont Court, 138 Mo. 311, 325. In Foster v. Railway, 115 Mo. 165, 177, it is said that a general charge of negligence is good "*after answer*" (italics ours). So, therefore, if we are to regard the Supreme Court as now holding

that such general charge is insufficient if objected to before the trial, defendant's point is still not tenable, since its objection was first made after the trial opened.

2. Defendant next objects to the sufficiency of the proof of plaintiff's case—that it is not shown that the fall of the bar was caused by negligence. Looking at the entire evidence, it appears that the carpenters were prying up a board or joist when the bar fell. The only evidence is that it fell and struck plaintiff on the head. There is nothing to show why, or how, it fell. We believe such evidence sufficient to cast upon defendant the necessity of explaining. Unless defendant can account for the fall of the implement in such way as to exculpate itself it will be held to have done the act negligently. We stated the rule to be in Shuler v. Railway, 87 Mo. App. 618, 623, "that when an accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, it will be presumed to be negligent." In the case of Dougherty v. Railway, 9 Mo. App. 478, Judge Thompson has gathered some cases which fully support what we have said:

"Thus, a traveller is passing under a bridge, which a railway company has thrown across a highway; at the same time a train is passing over the bridge on the railway; a brick falls from the wall of the bridge upon the traveller and hurts him. There is no evidence whatever as to how the brick came to be loosened from its place. The railway company must explain that the brick came to fall from some cause consistent with its innocence, or pay damages to the traveller. Kearney v. Railway, L. R. 5 Q. B. 411 and L. R. 6 Q. B. 759; s. c., 2 Thomp. on Neg. 1220.

"A traveller passing along the street is struck by a barrel of flour falling from the window of an abutting warehouse. There are no other facts in evidence. The occupier of the warehouse must pay damages to the traveller, unless he can show that there was no negli-

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gence on the part of himself or his servants. Byrne v. Boadle, 2 Hurl. & Colt. 722; s. c., 33 L. J. (Exch.) 13.

"An officer of customs is passing, in the discharge of his duty, from one door of a warehouse to another, when some bags of sugar fall on him. There is no other evidence. The proprietor must excuse himself or pay damages. Scott v. Dock Co., 10 Jur. (N. S.) 1108.

"A person calls at the door of the defendant's place of business to make an inquiry. While there, a packing case which has been negligently set up against the wall falls on him. There is no evidence as to how the packing case came to fall, or who placed it against the wall. Here, again, the defendant must explain or pay damages. Briggs v. Oliver, 4 Hurl. & Colt. 403; s. c., 35 L. J. (Exch.) 163.

"A person is lawful on the street, when without fault on his part, an adjoining building falls down, injuring him. He makes out a case for damages against the owner by proving these facts, without more. Mullen v. St. John, 57 N. Y. 567; Vincett v. Cook, 4 Hun 318.

"So, if water escapes from the hydrant of the tenant of the upper floor of a building and does damage to the tenant of the lower floor, the latter makes out a prima facie case for damages by proving this fact, without more. Warren v. Kaufman, 2 Phila. 259."

We are therefore led to hold that plaintiff sufficiently both alleged and proved his case.

3. But notwithstanding this, there is a further objection made by defendant which we conclude bars plaintiff's recovery. It is, that plaintiff and the carpenters who were using the iron bar were fellow-servants. Engaged as plaintiff was, in hauling away the "trash" and "rubbish" made by the carpenters in their work, there can be no doubt of their relationship being that of fellow-servants.

While we have in this State what is known as a fellow-servant statute whereby the master of common

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servants is answerable for their negligence to each other, it only applies to railroads as that word is commonly understood. And, in a recent case decided by the Supreme Court, it is held that a street railway is not within the provisions of such statute, and that therefore the servants of such railway can not hold the master for an injury inflicted through the negligence of fellow-servants. Sams v. Railway, 174 Mo. 53; s. c., 73 S. W. 686.

In avoidance of this objection plaintiff suggests that there is nothing in this case to show that defendant is a street railway company. We think there is. The action itself is brought against the "Metropolitan *Street* Railway Company." The petition charges that such company "is a common carrier and a corporation organized and existing under the laws of the State of Missouri, owning and operating street and electric railways in Kansas City, Missouri, and between Kansas City, Missouri, and Argentine, Kansas, and Independence, Missouri, and from Aregntine, Kansas, to Independence, Missouri. That on the second day of August, 1902, plaintiff was in the employ of defendant engaged in hauling trash from the basement of its power-house (the evidence shows it was a 'cable-house') at Thirteenth and Charlotte streets in Kansas City, Missouri." While there is no direct and affirmative proof that defendant was a street railway company, yet the whole case shows that that was assumed. The allegations of the petition show it to be such. It is true the petition uses the language, "street and electric railways in Kansas City, Missouri" and between Kansas City and Argentine and Independence, yet the court will take judicial notice that these are but suburbs of Kansas City. And that though Argentine is separated by the State line between Missouri and Kansas, yet they are in fact one continuous urban population. The street railway defendant in the case (supra) decided by the Supreme Court was one which operated

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on the streets in St. Louis and between that city and its suburb, known as Kirkwood. There can be no doubt that the full force of the reason employed by Judge VALLIANT in the case referred to, finds direct application to this street railway defendant.

It follows that defendant's demurrer to the evidence should have been sustained. The judgment will be reversed. All concur.

THE CITY OF SEDALIA ex rel. GILSONITE CONSTRUCTION COMPANY, Plaintiff in Error, v. JENNIE R. SCOTT, Defendant in Error.

Kansas City Court of Appeals, January 4, 1904.

1. **TAXBILLS: Jurisdiction of Council: Remonstrators.** When a majority of property owners abutting on a street sought to be improved sign and file a remonstrance with the city clerk, it ousts the council of jurisdiction; and the withdrawal therefrom of remonstrators can not reconfer jurisdiction. To make the taxbill issued for such improvement valid new proceedings should be begun. Following Knopfi v. Roofing & Paving Co., 92 Mo. App. 279.

2. ———: ———: ———: **Record.** A remonstrance against a street improvement, and the written withdrawal therefrom, and the report of the committee to which these were referred constitute a part of the record of the city council.

3. ———: ———: ———: ———. On a review of the record it is found that a majority of the property owners remonstrated, and the attempted subsequent withdrawal of a part of said remonstrators was non-effective, since the remonstrance had already completed and fulfilled its purpose.

4. ———: ———: ———: ———: **Parol Evidence.** Where the record of a city council in a proceeding for a public improvement at the expense of the property of a citizen without his consent fails to show the council had jurisdiction, the action taken under such record is void and can not be validated by parol testimony.

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5. ———: ———: ———: ———: ———: **Administrator.** On a review of the record it appears that no name signed by an administrator was counted in making up the total number of remonstrators, and it was proper to refuse evidence tending either to contradict the record or to supplement it in such a vital particular.

6. ———: ———: ———: ———: ———: ———. The marks and figures on a remonstrance are reviewed and held insufficient to show that an administrator was counted as a remonstrator; however, in such case the record must control and can not be contradicted by surmise or conjecture or eked out by parol evidence.

7. ———: ———: ———: ———: ———: **Principal and Agent.** That certain associations and corporations signed a remonstrance by their chief officer is sufficient, and it can not be shown that the signatures were attached without authority from the board of directors.

8. ———: ———: ———: ———: ———. While the record of a municipality may be attacked by parol evidence in behalf of a citizen whose property is taken or taxed *in invitum.* Yet such record can not be questioned by the city in any particular since that is tantamount to holding that no record is necessary.

9. ———: ———: ———: ———: ———: **Parliamentary Manual.** An objection that the council in receiving a report had not conformed to the parliamentary manual adopted to govern its proceedings is held, not well taken and such bodies are not bound to act in accordance with their rules or by-laws as they may, and oftener than otherwise do, waive them.

Appeal from Pettis Circuit Court.—*Hon. George F. Longan,* Judge.

AFFIRMED.

Geo. P. B. Jackson and *Montgomery & Montgomery* for plaintiff in error.

(1) A paper produced from the files of the city clerk, and purporting to be a remonstrance against a street improvement, and purporting to be signed by forty-three persons, does not prove itself, and is not competent evidence that the persons whose names ap-

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pear thereon ever signed the paper or authorized any other person to sign for them; and is not competent evidence that such persons own property abutting upon the street improved and liable to taxation therefor; and is not competent evidence that such persons reside in the city; and is not evidence that such persons constitute a majority of the resident owners of property abutting on the street improved and liable to taxation therefor. (2) The record of the council is the journal of the council proceedings which the clerk is required by law to keep. This journal should contain a minute of every act of the council. R. S. 1899, secs. 5772 and 5774. (3) In so far as it does so it is competent proof and the only competent proof of what the council did. It will be conclusively presumed that the council did just what its journal says it did, no more and no less. (4) The council had power to adopt its own rules of parliamentary procedure. R. S. 1899, sec. 5772. Such power exists independently of the statute and inheres in every deliberative body. (5) Pursuant to such power, it adopted Cushing's Manual as its parliamentary guide. Therefore, all parliamentary terms must be construed to mean what Cushing's Manual defines them to mean. (6) When any proposition is made to a deliberative assembly, it is called a motion: when it is stated or propounded to the assembly for their acceptance or rejection, it is denominated a question: and when adopted, it becomes an order, resolution, or vote of the assembly. (7) The first question upon a report, is upon receiving it. The adoption of a resolution to receive the report, means that the council (1) consents to hear the report read (2) discharges the committee, and (3) places the report upon the table until it sees fit to take it up for further consideration, if ever. The council may never consider the report again. It may wholly ignore it. Cushing's Manual, secs. 287, 290. (8) The final question on a report, is upon its adoption or acceptance. When accepted or adopted the statement, reason-

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ing, opinion, resolution or other act becomes the statement, reasoning, opinion, resolution or other act of the assembly as the case may be. This is done by resolution. Cushing's Manual, sec. 295. (9) The word "find," as applied to the council's action, means that the council is satisfied and determines from the evidence adduced, and declares that a certain fact under investigation exists. State v. Beloit, 74 Wis. 267. (10) An administrator as such has no right to sign a remonstrance for his decedent. John N. Dalby, administrator of the estate of Mary A. Hogue, should not have been counted. Mulligan v. Smith, 59 Cal. l. c. 225; Rector v. Board, 50 Ark. 116; Holland v. Baltimore, 11 Md. 186; Batty v. Hastings, 63 Neb. 26. (11) A conveyance to S. Wright & Son passes the legal title to S. Wright. Hence S. Wright & Son should not have been counted as two remonstrants. Arthur v. Weston, 22 Mo. 378. (12) Thus the record of the council shows that the committee's finding, that a majority did not remonstrate, was correct.

Barnett & Barnett for defendant in error.

(1) This court has already settled the question that the ordinance involved in this case and the taxbills issued thereunder are absolutely void. Every contention made by the plaintiff in error in this case has been decided adversely to it. Knopfi v. Gilsonite Roofing & Paving Co., 92 Mo. App. 279. (2) The act of the council referring the remonstrance to a committee for investigation, the report of the committee received and filed to the effect that there were sixty-one resident property owners and thirty-two had signed the remonstrance and that the committee found that the remonstrance had been reduced below a majority by withdrawals, and, further, the fact that thereupon at the same meeting, without further investigation, the ordinance was introduced and put upon its passage consti-

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tutes an adoption by the council of said report, and a finding that thirty-two of the sixty-one had signed the remonstrance and constitutes an adoption by said council of the views expressed by the city counselor to the effect that the council had acquired jurisdiction by reason of these withdrawals. Knopfi v. Gilsonite Roofing & Paving Co., supra, local citation, pp. 291 to 294. (3) It being ascertained that there were but sixty-one resident property owners on the street and that the remonstrance contained the names of thirty-two persons competent to remonstrate, of course the remonstrance contained a majority, even rejecting the name of Fannie Hartshorn. (4) While the defendant in this case could attack and show that notwithstanding its recital the city in fact did not have jurisdiction to proceed, yet neither the city nor the contractor holding under it can assail the record. The record itself must disclose jurisdiction in the council and authority to make the improvement. Therefore the court did right in excluding the offer to show that certain parties signing the remonstrance were not competent to do so. Knopfi v. Gilsonite Roofing & Paving Co., supra, pp. 291 to 294. (5) The council could not acquire jurisdiction by the withdrawal of names from the remonstrance filed, as the filing of the remonstrance with a majority of the property owners signed thereto deprived the council of jurisdiction to proceed without regard to the subsequent action of the remonstrators. This question is settled in the Knopfi case.

ELLISON, J.—This is an action based on a special taxbill for street paving in the city of Sedalia. The bill is one of a number of others issued against the property of different property owners abutting on the improvement. One of these property owners brought a suit in equity to declare void the bill issued against his property. In that case, on appeal to this court, it was decided that the bill was invalid. Knopfi v. Roofing &

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Paving Co., 92 Mo. App. 279. Suit in this and sixteen other cases was brought at law against other property owners by the holder of the taxbills for the same improvement. The trial court found that a majority of the property owners on the street to be improved filed with the city clerk their remonstrance against the improvement within ten days of the publication of the resolution proposing the work and rendered judgment for defendant. The plaintiff brought each case here by writ of error. They are all submitted on the briefs in this one and are to abide the result reached in this one.

1. The record now before us is in most respects identical with that in the Knopfi case and the opinion in that case has not been questioned by counsel, though other and additional points have been set out and urged to sustain the validity of the tax.

As stated in the Knopfi case, it is provided by the laws of 1893, section 110, page 92, that when the council shall deem it necessary to pave or otherwise improve a street for which a special taxbill is to be issued, ". . . they shall by resolution declare such work or improvements necessary to be done, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days thereafter, file with the clerk of the city their protest against such improvements, then the council shall have power to cause such improvements to be made, and to contract therefor, and to levy the tax as herein provided. . . ."

A resolution was passed and published looking to the paving in question, and within ten days a majority of the resident owners of party liable to be taxed filed with the city clerk their remonstrance against the improvement. Afterwards, but within ten days of the publication, a sufficient number of those signing and filing the remonstrance withdrew therefrom to reduce the number remaining below a majority. We decided in

that case that when a majority of property owners signed a remonstrance and filed it with the city clerk it ousted the council of jurisdiction, and that after signing and filing with the clerk, a portion of the signers could not withdraw therefrom so as to reconfer jurisdiction. And that if it was still desired to make the improvement a new proceeding should be begun.

2. We regard the papers known as the remonstrance and the written withdrawals therefrom and the report of the committee to which these were referred as parts of the record of the city council. From these it appears that there were sixty-one property owners and that forty-three signed the remonstrance. That of the latter, one signed and filed a withdrawal from the remonstrance several days before it was filed with the city clerk, and six others (making seven in all) signed and filed their withdrawal the next day after it was filed with the clerk. The record, however, further shows that the committee must have determined that only five of the seven were competent to be counted as withdrawing, for only five were reported. This was probably from the fact that it determined that two were not proper remonstrants and not being persons who could remonstrate in the first instance, of course, could not withdraw. The committe cut out eleven of those signing the remonstrance, thereby reducing the number to thirty-two proper remonstrants in the opinion of the committee. From these it subtracted five as having withdrawn, leaving in the opinion of the committee only twenty-seven remonstrants.

We readily concede that a remonstrant may withdraw from the remonstrance before it is filed. For till then it is not an effective paper, since it has not been delivered (so to speak) by filing with the clerk of the council. So therefore when the one property owner withdrew her protest before the paper was filed, it reduced the qualified remonstrants as found by the committee to thirty-one. But the subsequent withdrawal of the four

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others did not affect the remonstrance, leaving it still numbering thirty-one, and that being a majority of the sixty-one property owners, it left the council without jurisdiction and consequently its subsequent issue of the taxbills in controversy was unauthorized act and such bills are void; unless such action is validated by the following considerations based upon the records of the council which have been urged upon us by plaintiff.

3. It is shown by the record of the council that the remonstrance and the withdrawals therefrom were, by the council "referred to the city counselor, the street and alley committee and the city engineer for investigation." These officials afterwards (as above stated) made report to the council in which they stated that they had been guided by the city attorney in determining who were qualified to sign the remonstrance and when they might withdraw therefrom, viz.: "The names of parties competent to be counted for or against the paving have been determined upon the advice of the city counselor as is shown in the attached letter from him." The part of the attorney's letter which is pertinent to present inquiry is as follows:

"You submitted the following questions of law for my decision, connected with the matter of the contemplated paving of Sixth street, from Lamine avenue to the west line of Grand avenue . . . 2nd. Can a person who has signed a remonstrance change the effect of such signing so as to be counted for instead of against the pavement when the change is made in the form of a written request, signed and filed before the time for remonstrance expires? 3rd. Can the administrator of an estate sign a remonstrance, or be counted when the estate owns land on the street? . . .

"2nd. It is my opinion that when a person has signed a remonstrance and before the time expires for the protest to be filed, directs his name to be withdrawn, and does this in writing, with his name signed thereto,

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he should not be counted as remonstrating, and may be legally counted as in favor of the improvement.

"3rd. An administrator of an estate can not sign a remonstrance or be counted as in favor of the pavement, so as to affect the owners. The lands of a deceased person always descend directly to the heirs, and never is taken charge of by the administrator, except for the payment of debts of the estate. No personal judgment could be rendered against the estate for the cost of the paving. The land alone is liable and the heirs are the owners, and residents must be counted."

The record of the council then shows that at a meeting of the council, "On motion of Rickman, it was seconded and carried, the report be received and placed on file." That thereupon, at the same meeting, the ordinance providing for the improvement in question was put in course of passage by being read the first time and then immediately by a suspension of the rules "placed on its second reading and read the second time." Afterwards, at the first meeting of the council when a quorum was present, the ordinance was read "the third time" and then on suspension of rules was immediately duly passed.

It is thus seen that the report of the committee, including the city attorney, found that there were sixty-one resident property owners, that of these there were thirty-two competent to remonstrate who did remonstrate; but that five of them had withdrawn from the remonstrance. To repeat again, the remonstrance was signed by forty-three persons and the withdrawals were signed by seven of these. But the committee in ascertaining who were the proper remonstrants and acting under the advice of the attorney, as to who was a resident owner of property, and as to whether an administrator could remonstrate for the estate he represented, found that there were sixty-one resident property owners and that of the number signing the remonstrance there were thirty-two competent, and that of

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these five had withdrawn from the remonstrance, the two others signing the withdrawal, evidently not having been counted as remonstrants, were not counted as withdrawing. Thus under this report, the council on the basis of sixty-one resident property owners and thirty-two remonstrants, less five withdrawals, which, if effective, reduced the remonstrants to less than a majority, proceeded to pass the ordinance. If therefore, there were not enough withdrawals to reduce the thirty-two competent remonstrants to less than a majority of the sixty-one property owners, the council was clearly without authority to pass the ordinance. Of these five, one withdrew before the remonstrance was completed and filed. We have already said that such withdrawal was effective. But the withdrawal of the other four was non-effective, since the remonstrance had already completed and fulfilled its purpose. It follows that plaintiff's point based on this view of the record is not well taken.

4. But plaintiff endeavored to show by a witness that the committee counted as one of the thirty-two remonstrants the estate of Mary A. Hogue which was signed to the remonstrance as "Mary A. Hogue by J. N. Dalby, admr." This offer of the proof was made on the idea that if such signature was not competent as signed to the remonstrance it showed that there were but thirty-one remonstrants. From which it stands conceded that there was one withdrawal made before the remonstrance was filed thus (under this idea) reducing the number to thirty, which was less than a majority. The court refused the offer. The refusal was proper.

If the record of a city council in proceedings for public improvements at the expense of the property of the citizen without his consent fails to show that the council had jurisdiction, the action taken under such record is void and can not be validated by oral testimony. 2 Dillon on Munic. Corp., sec. 800; Ogden City

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v. Armstrong, 168 U. S. 224; Miller v. Amsterdam, 149 N. Y. 228; Property owners are not parties to the contract for such improvements. The proceedings as to them are *in invitum* and their property is not affected unless it is brought within the strict meaning of the statute. Thornton v. City of Clinton, 148 Mo. l. c. 663. And as we said in the Knopfi case, this has been the rule in this State in kindred matters. Whitely v. Platte Co., 73 Mo. 30; Zimmerman v. Snowden, 88 Mo. 218; Chicago Ry. Co. v. Young, 96 Mo. 39.

5. But plaintiff does not stand on the mere refusal to hear such oral testimony. Plaintiff further urges that the record itself shows that one of the thirty-two remonstrants counted by the committee was the estate of Mary A. Hogue signed by the administrator. That the administrator had no authority to sign and that therefore the record itself shows there was only thirty-one competent remonstrants, and one withdrawal conceded to be valid reduced the number below a majority. But the record does not sustain plaintiff's position. The report of the committee, as above set out, shows that there were thirty-two remonstrants which, the report says, were counted as ascertained under the written guidance of the city attorney. The attorney's directions (as shown by the report) were that a name signed by an administrator was an unauthorized signature and could not be counted as a remonstrant. It therefore appears of record that no name signed by an administrator was counted in making up the total number of thirty-two remonstrants. It was therefore proper, under the authorities aforesaid, to refuse evidence tending either to contradict the record or to supplement it in such vital particular.

6. It is true that on the original remonstrance as filed with the city clerk there appears among the signers thereto the signature, already referred to, viz., "Mary A. Hogue by J. N. Dalby, admr." But as just stated, the record discloses that it was not counted. The fig-

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ures "24" are found to the left of her name on the line of the signature. It is not pretended that they were there when her name was written. On the contrary, it is claimed by the plaintiff that the city engineer put them there as the number which he counted her and which went to make up the total of thirty-two which he reported. Such claim is in the face of the report disclosing that they did not count it. While we may surmise that her name was possibly counted, yet if we go into mere conjecture, could we not with much more reason say that the number may have been placed opposite her name with other numbers and memoranda which appear at other places, at some time during the investigation by the committee, but not relied upon or considered when the final result was reached as embodied in the report to the council. Suppose, for instance, the committee found in going over its work before making out its report that it had erroneously classed some other signer as a non-resident and incompetent to sign, and, in view of the attorney's opinion, had erroneously classed the administrator's signature as competent. Their report would have been just as it is found in the recond. But the true answer to make to all these suggestions is that the record must control and that it can not be contradicted by surmise or conjecture, or eked out by oral evidence in any substantial particular.

7. Other objections are presented which it is claimed were also not made in the Knopfi case. These objections are of such character as to fully illustrate the wisdom of the rule which requires that the record of the council must show that it had jurisdiction when it took action involving the power to levy assessments against the property without the consent of its owners. First it is claimed that the court erred in refusing to permit plaintiff to show that the names of several of those appearing in the remonstrance were not the signatures of such persons. That others did not own property on the

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street. That there were more than sixty-one resident property owners on the street to be paved. That the name of the First Congregational Church was signed by the chairman of its board of trustees without consulting the other trustees and should therefore not have been considered. That the Sedalia Building and Loan Association and the Equitable Loan and Investment Association were signed by their presidents without authority from their board of directors. These objections show to what length the courts are asked to go in support of a proceeding against the right and property of the citizen. They mean that the record upon which a tribunal vested with extraordinary taxing power upon which property is to be taken against the will of its owner may be modified, changed or destroyed altogether in order to consummate such purpose.

There are numerons cases where oral testimony has been permitted for the purpose of overthrowing and destroying a record providing for the exercise of eminent domain; for public work at the expense of the abutting owner and the like, but such evidence was received and offered in behalf of the citizen whose property was sought to be taken. In such instances, as we pointed out in the Knopfi case, abundantly supported by the authorities, the record of the council may be disputed (except where made conclusive by statute) by the property owner. But that it can not be questioned by the city, in any substantial particular, is made apparent by the suggestion that to hold it could be would be tantamount to holding that no record at all would be necessary in such cases.

8. If the committee counted the signatures referred to as composing a part of the thirty-two remonstrants, it must have been for the reason that they were satisfied these different agents were in fact acting for the persons and corporations for whom they assumed to act. If the names were counted by the committee, they were accepted by the council as having been properly

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signed. That they could properly be so accepted is manifest. It was not necessary that authority of an agent, or of the officer of a corporation assuming to act for the principal, should accompany the remonstrance. Los Angeles v. Los Angeles, 106 Cal. 156; Tibbetts v. Railway, 153 Ill. 147; Allen v. City of Portland, 35 Ore. 420; Day v. Fairview, 61 N. J. L. 621.

9. Plaintiff introduced at the trial an ordinance of the city adopting Cushing's Manual as a rule governing its parliamentary action. Certain sections of the Manual were then introduced to show that the proceedings of the council do not disclose that it governed its action by the report, and that the council might have ascertained in other ways, independent of the report, that the remonstrance, when filed with the clerk, did not contain the names of a majority of the property owners. These sections of the manual (286, 287, 289, 290, 295) show the usual parliamentary manner of procedure when a committee makes a report. We can not discover anything in them to aid the plaintiff, but rather the contrary. The last section (295) introduced reads that, "when a report is received . . . the committee is discharged, and the report becomes the basis of the future proceedings of the assembly on the subject to which it relates." In this case, as already stated, the committees report that the remonstrance did not contain a majority by reason of the withdrawals being "received and placed on file," and the council thereupon, at the same meeting, proceeded with the ordinance for the improvement. That is to say, the council, as indicated by the rule, accepted the report as a basis for its future action by immediately going ahead with the ordinance for the improvement. That the report of the committee that there were sixty-one property owners, of whom thirty-two, less five withdrawals, had protested, was the foundation of the council's action none can doubt. That there was any other basis is only suggested as a conjecture.

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So that even if it should be conceded that according to the sections of the Manual introduced in evidence, the council did not act on the report, the whole record shows that beyond any doubt the council did take it as a basis of its action. But even if the council had acted out of harmony, or in contradiction of the rules of the Manual, it did no more than it legally might do, since such body is not bound to act in accordance with its rules or by-laws. Such bodies may, and perhaps do, oftener than otherwise, waive them. Holt v. City of Summerville, 127 Mass. 411; Bennett v. New Bedford, 110 Mass. 433; Ex parte Mayor of Albany, 23 Wend. 280.

After full consideration of the points suggested in behalf of plaintiff against the judgment of the trial court we have found no error and consequently order its affirmance. All concur.

BERNICE MILLER, by Next Friend, Respondent, v. GEORGE B. PECK DRY GOODS COMPANY, Appellant.

Kansas City Court of Appeals, February 1, 1904.

1. **NEGLIGENCE: Unfastened Window: Fall of Child: Jury Questions.** Where a reception room in a department store is almost constantly used by women customers and their small children, whether it is negligence to leave a window hung on pivots extending to the floor and twenty-five feet above the ground with no bars across it in the sole dependence that it would remain constantly bolted, is a question for the jury.

2. **———: Dangerous Premises: Invitation: Infant.** Where a department store keeps a reception room for its patrons and their children, the invitation to the trading public must be held to include infants and the owner owes the same duty to the customer's child as to the customer.

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2. ———: Pleading: Bars Across Window. A petition is reviewed and held to fairly charge negligence in failing to maintain bars for a window swung on pivots regardless of whether there were or were not other fastenings which, when properly closed, would make it secure.

Appeal from Cass Circuit Court.—*Wm. L. Jarrott*, Judge.

AFFIRMED.

Harkless, O'Grady & Crysler for appellant.

Upon the proposition that the plaintiff can not recover in this case for the reason that the defendant was in no way at fault itself, and could not have anticipated the act of a third party in interfering with a window in an otherwise safe and proper condition, and that the accident was the result of the independent act of a third party which was the proximate cause of the accident, we invite the court's reading of the following authorities: Krone v. Railway, 97 Mo. App. 609; Goodrich v. Railway, 152 Mo. 228; Burns v. Railway, 129 Mo. 53-55; Thompson v. Railway, 93 Mo. App. 548; Witte v. Stifel, 126 Mo. 295; Pavey v. Railroad, 85 Mo. App. 222; Railey v. Rome & W. R. Co., 49 Hun (N. Y.) 337; Oehme v. Cook, 15 Daly (N. Y.) 381; Railroad v. Swarts, 58 Kan. 240-241; Cole v. German Savings, 124 Fed. 113; Frassi v. McDonald, 122 Cal. 400; Raymond v. Kesseberg, 91 Wis. 191; Pawling v. Hoskin, 132 Pa. St. 617; Dwyer v. Shaw, 50 Atl. 389; Hood v. Argonaut, 23 Ky. 460; Clapp v. LaGrill, 103 Tenn. 164; Canfield v. Newport, 24 Ky. 2213; Fuchs v. St. Louis, 167 Mo. 620; Chander v. Gas Co., 73 S. W. 502.

Wilson & Wilson and *Frank P. Sebree* for respondent.

The reception room in defendant's store was an unsafe place for young children on account of the dangerous character and structure of the window in ques-

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tion, and defendant having invited the public to occupy this room, it was negligence on the part of the defendant to have kept such a window; and in failing to see that the window was kept bolted; and in failing to have a guard or rail in front of the window; and in failing to warn persons of its dangerous condition. Benjamin v. Railway, 133 Mo. 374; Morgan v. Cox, 22 Mo. 373; Hartman v. Muehlbach, 64 Mo. App. 578; Welch v. McAllister, 15 Mo. App. 492 and cas. cit.; O'Donnell v. Patton, 117 Mo. 13; Sykes v. Railway, 88 Mo. App. 193; 21 Am. and Eng. Ency. Law, p. 472; Brosnan v. Sweetser, 127 Ind. 1; Elliott v. Pray, 10 Allen (Mass.) 378; Beck v. Carter, 68 N. Y. 283; Beach, Contributory Neg., sec. 51; Tousey v. Roberts, 114 N. Y. 312; Huset v. J. I. Case Mfg. Co., 120 Fed. 865; Moore v. Railroad, 84 Mo. 481; Nagel v. Railway, 75 Mo. 653; Nave v. Flack, 90 Ind. 205; Warner v. Railway, 62 Mo. App. 184; Mortgage Co. v. Rees (Colo.), 42 Pac. 42; Market Co. v. Claggett, 19 App. Cas. D. C. 12; Boyce v. Railway, 8 Utah 353.

ELLISON, J.—This action is for personal injury received by the plaintiff as the result of falling out of a window of defendant's building to the street twenty-five feet below. At time of injury plaintiff was a child between one and two years old. The judgment in the trial court was for the plaintiff.

It appears that defendant is the proprietor of a large retail business in Kansas City known as a department store. That in the prosecution of such business it has and maintains a building several stories in height, at the northwest corner of Eleventh and Main streets. That on the third floor of the building, twenty-five feet above the sidewalk, defendant maintains a large general reception room to which the public, including women accompanied by little children, are invited to come. That on the south side of the room is a large window, extending down to within three or four inches

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of the floor; the lower sash of which was between five and six feet high and hung on pivots with sliding bolts at the top and bottom to hold it in place. That when unbolted it would, with slight pressure, swing outwardly from the bottom. That some time prior to the injury to plaintiff there were crossbars or rods fastened from the bottom of the window frame up to a height sufficient to prevent children from falling out of the window should it be open. These were maintained by the defendant in the summer months, but at the time of the accident had been removed.

On November 5, 1901, plaintiff's mother took her to defendant's reception room. They were accompanied by a lady friend and two other small children, one being the friend's, and the other a sister of plaintiff. The mother desiring to do some shopping left plaintiff and the other child in charge of the friend while she went out into the body of the store to make her purchases. While she was gone, the two older children were playing about the room near the window, the plaintiff taking part in a limited way. They were on and off of a couch near the window and at times stood on the window sill, which, as before stated, was down nearly flush with the floor. During this play of the children plaintiff sat on the window sill and leaning back against the glass, pressed the sash out which caused her to fall to the pavement below. Though the fall was twenty-five feet and the pavement was stone, yet plaintiff escaped death; but her injuries were such as to afford no ground of complaint at the amount of the verdict.

To hold defendant liable for the injury, the petition charges four specific acts of negligence. First, that the sash was left so that it would swing out when only slight pressure was applied, such as by a little child leaning against it. Second, that the sash being swung on pivots defendant did not have any bars, or grating, or other fixtures in the window so as to prevent small children like plaintiff from falling out. Third, that de-

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fendant failed to notify plaintiff's mother or the lady friend left in charge of the children of the condition of the window. Fourth, that defendant kept the room for the reception of mothers and small children well knowing that a child "could, and might, easily fall out of the window."

The principal point urged by defendant is that plaintiff did not make a case and that its demurrer to the evidence ought to have been sustained. This is based on the fact that the window sash was provided with a bolt at the top and bottom with which it was ordinarily fastened and that when so fastened it was perfectly safe. That up to an hour and a half of the time of the misfortune to plaintiff, it was known to have been bolted. That somewhere between that time and the accident, some one without the knowledge of defendant or its servants had unfastened the bolts and opened the window and then left it shut or swung back in place, but neglected to fasten it. That defendant could not, in reason, be expected to foresee that that would be done and in consequence that a child might fall out. Keeping in mind, in this connection, that the petition charges that it was negligence in defendant to maintain such a window, at such a place, without cross-bars or rods to keep children from falling out of it, if it should be open, or should be shut but unbolted, the defendant's contention amounts to a statement that the trial court, as a matter of law, should have declared such omission was not negligence. We are of opinion that the trial court's action in refusing to sustain the demurrer was proper. In view of the fact that the room was one almost constantly occupied by women and small children, it seems to us that to maintain, twenty-five feet above the ground, a window which extended to the floor, with no bars across it, in the sole dependence that it would remain constantly bolted, made a state of case which should be left to the jury that they might say whether that was such an act, or series of acts, as a

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man of ordinary prudence and carefulness would commit. It certainly should occur to any careful man that a window hung on pivots so as to swing out from the bottom, coming to the floor of a room in the third story of a building, and not opening out onto a balcony, the room to be occupied by large numbers of women and small children, should have more safety guard than merely two bolts which could be so easily withdrawn.

The law as to the duty that a person owes to those he invites onto his premises has been so uniformly stated as that it has grown to be uncontroverted that he must keep his premises in such condition as to be reasonably free from danger. And that if necessary he maintains dangerous places in the prosecution of his business he must have been guarded, or give warning of their existence. It has been discussed and stated by the Supreme Court in O'Donnell v. Patton, 117 Mo. 13. By the St. Louis Court of Appeals, through Judges Thompson and Goode, in Welch v. McAllister, 15 Mo. App. 492; Sykes v. Railway, 88 Mo. App. 193, 204; and Kean v. Schoening, 77 S. W. 335. And by this court through Judge SMITH in Hartman v. Muehlebach, 64 Mo. App. 578.

The difference between this case and ordinary cases lies in that the plaintiff, being a mere helpless infant, was not on defendant's premises for the transaction of business with defendant. But that difference in fact makes no difference in point of law. For, it being shown that defendant maintained the room as a reception or waiting room for women patrons of the store who were accompanied by their children, the invitation which defendant gave out to the trading public must be held to include such children as plaintiff who were taken there by their parents. From this, it follows that the same duty which the owner owes to his customer he likewise owes to the customer's child.

What we have said disposes of the greater part of the complaint as to defendant's refused instructions.

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We regard the twelfth refused instruction, as refused and as modified and given, as being far too liberal for defendant. That instruction authorized a verdict for defendant if the window was bolted an hour and a half before the accident and some one in the room unfastened it, and defendant did not know, nor by diligence could have known it was unfastened. It left out of consideration whether defendant should have had bars across the window. Bars or rods would have made the window safe in just the situation the instruction mentions.

We have considered the insistence of defendant that the petition does not authorize a recovery on the ground of negligence in omitting to have bars across the window. We think that it does. It is true it charges that the sash was hung on pivots so that a slight pressure at the bottom would cause it to swing outward and that it makes no reference to the bolts with which the evidence shows it was provided, so that when fastened it could not be moved. From this, defendant infers that the pleader based the whole case on the absence of fastening for the sash, *on account of which* it was negligence not to have bars across the window. But we believe the petition can fairly be interpreted to charge negligence in failing to maintain the bars for a sash swung on pivots at such a place, regardless of whether there were or were not fastenings to the sash which, when properly closed, would make it secure.

After full examination of all the points made against the judgment we feel that we are not authorized to disturb it and in consequence order its affirmance. The other judges concur.

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MARY QUINLAN, Respondent, v. KANSAS CITY, Appellant.

Kansas City Court of Appeals, February 7, 1904.

1. **Municipal Corporation: Icy Sidewalk: Obstruction.** A municipality is liable for injury because of rough and uneven ice so rounded up and inclined as to constitute an obstruction and make the sidewalk unsafe for travel with the exercise of ordinary care, and the city should remove the same within a reasonable time after notification, whether such ice is formed by accidental or incidental discharge of water.

2. **———: ———: Cure of Erroneous Instruction.** An instruction for a plaintiff relating to a city's liability for an icy sidewalk is held faulty because the jury was not told that such ice must amount to an obstruction rendering the walk unsafe; held, further that such fault is cured by defendant's instruction.

Appeal from Lafayette Circuit Court.—*Hon. Samuel Davis,* Judge.

AFFIRMED.

R. J. Ingraham, City Counselor, and *J. J. Williams,* Associate City Counselor, for appellant.

(1) A city is not liable merely because a sidewalk is defective. To create liability it must be not reasonably safe. Blake v. St. Louis, 40 Mo. 569; Bonine v. Richmond, 75 Mo. 437; Robertson v. Railway, 152 Mo. 389; Carvin v. St. Louis, 151 Mo. 334; Warren v. Independence, 153 Mo. 593; Smith v. Brunswick, 61 Mo. App. 578; Wallis v. Westport, 82 Mo. App. 522. (2) The city is not liable merely because ice on its walk is rough and uneven. Reno v. St. Joseph, 169 Mo. 656. (3) Plaintiff's instructions numbered 1 and 2 state a false ground of recovery, and are not cured by defend-

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ant's instructions. Welsh v. Railway, 20 Mo. App. 477; Herbert v. Mound City S. and S. Co., 90 Mo. App. 305; White v. Ins. Co., 93 Mo. App. 282; Baer et al. v. Lutter, 85 Mo. App. 317; Dunham et al. v. Harling et al., 69 Mo. App. 509. (4) Plaintiff's instruction number 3 is erroneous. Cook v. Railway, 94 Mo. App. 417. (5) Plaintiff's instruction number 4 is erroneous. Bank v. Murdock et al., 62 Mo. 74. (6) The demurrer to the evidence should have been sustained. Reno case, supra.

Henry J. Latshaw, Jr., for respondent.

(1) For the sake of the argument respondent could admit that its instruction number 1, did tell the jury to find for plaintiff under conditions which failed to include the reasonable safety of the sidewalk, and still under the law, appellant can not complain. Blackwell v. Hill et al., 76 Mo. App. 46; Squires v. Kansas City, 75 S. W. 194; Lesser v. Railway, 85 Mo. App. 326; Owens v. Railway, 95 Mo. 169; Edwards v. Railway, 94 Mo. App. 36; Knight v. Sadtler Co., 91 Mo. App. 574; Gordon v. Burris, 153 Mo. 223; Grace v. Railway, 156 Mo. 295.

BROADDUS, J.—This suit was begun in the circuit court of Jackson county and taken by change of venue to Lafayette county where it was tried and appealed to this court.

The plaintiff sues for damages claimed to have been sustained by reason of a fall caused by the slippery condition of defendant's sidewalk. The evidence developed that plaintiff slipped and fell on the east side of Cherry street about twenty feet north of the corner of Thirteenth street, on January 11, 1901. Prior to the time of her fall and injury there had been a fall of snow and sleet which the plaintiff's evidence tended to show had mostly disappeared. But this was controverted by the defendant. However, there was evi-

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dence to the effect that the place where plaintiff slipped and fell, ice had formed from water freezing that had flowed down a spout leading to the roof of an adjacent house; that it formed to the extent of from two to six inches thick, about three feet wide beginning at the inside edge of the walk and extending diagonally across to the outside of it, and that it was rough and dented with abrupt edges. The testimony of plaintiff and her witnesses was that while passing along she came to the place described and when she stepped upon the ice so formed on the sidewalk her foot slipped and she fell and was injured. It was shown that the sidewalk was in the condition stated, more or less, for ten days previous to the accident.

There was a verdict for the plaintiff and defendant appealed.

It is one of defendant's contentions that the court should have sustained its demurrer to the evidence; but the facts stated plainly show that it was a case for the jury. It is the law that a city is not liable for the slippery condition of its streets caused by ice upon its sidewalks, unless it be that "the ice is so rough and uneven, or so rounded up, or at such an incline, as to make it an obstruction and to cause it to be unsafe for travel with the exercise of ordinary care." Reno v. St. Joseph, 169 Mo. 642. It was therefore a question for the jury under the evidence to determine whether the sidewalk under the condition described constituted an obstruction such as to render it unsafe for travel. In Reedy v. St. Louis, 161 Mo. 523, it was held: "Where the sidewalk is in fact rendered dangerous to pedestrians because of slippery ice formed from the accidental or incidental discharge of water, such not being the prevalent condition of sidewalks at the time, it is the duty of the city to cause the danger to be removed within a reasonable time after it has notice or by the exercise of ordinary care could have discovered the dangerous condition."

Instruction number one is objected to by defendant

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for the alleged reason that it, "authorized a recovery by plaintiff without regard to whether or not the ice made an obstruction or had any effect at all on the safety of the sidewalk. If only rough and uneven ice was a proximate cause of the fall the jury were told that plaintiff should recover." Said instruction is as follows: "The court instructs the jury if you find and believe from the evidence that at the time plaintiff slipped and fell the sidewalk at the point where she slipped and fell was covered with rough and uneven ice, and that said rough and uneven ice, if any, had remained upon said sidewalk at said point for a sufficient long time prior to the time plaintiff slipped and fell for the defendant by the exercise of ordinary care and caution to have known of the presence of said ice, if any, and in time for defendant to have had a reasonable opportunity to have removed said ice, or to have caused the same to be removed; and if you further find and believe from the evidence that said ice, if any, was a direct and proximate cause of plaintiff's slipping and falling, then the court instructs you that defendant is not relieved of its liability, if any to plaintiff, on account of the fact, if you find and believe from the evidence it is a fact, that said sidewalk at said time was covered with sleet, even though you further find and believe from the evidence that said sleet, if any, was also one of the direct and proximate causes of plaintiff's slipping and falling." The criticism is just. Rough and uneven ice may have existed at the point in question but that fact did not render it unsafe within the meaning of the law unless it amounted to an obstruction such as to render it unsafe to pedestrians.

While the plaintiff does not admit that said instruction is faulty, she claims that if it should be so held, the fault was cured by defendant's instruction number one. It must be admitted that said instruction contains many curative properties. It practically covers the whole

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case, being clear, concise and comprehensive. It is as follows:

"The jury are instructed that the defendant, Kansas City, is under no obligation to the traveling public who may use its sidewalks to remove from such sidewalks sleet or ice which produces a slippery condition only, nor is it responsible for injuries sustained solely by reason of any of its sidewalks being in a slippery condition because of ice or sleet thereon. Nor is it responsible merely because the ice or sleet is rough, or uneven; unless you find from the evidence that the ice or sleet where plaintiff claims she fell was so rough or uneven that its roughness or unevenness made it an obstruction, and caused the sidewalk to be unsafe for travel with the exercise of ordinary care, or find that it had been permitted to accumulate and remain upon the walk, until, by thawing and freezing, it became an obstruction, and thereby rendered the sidewalk unsafe for travel; and that the defendant city had knowledge of such obstruction, or by the exercise of reasonable care might have had knowledge of such obstruction long enough before the accident to have removed the same before the accident, or by the exercise of reasonable care, then the defendant is not liable, and your verdict should be for it."

In Blackwell v. Hill, 76 Mo. App. 46, this court held: "An instruction for the plaintiff which was incomplete in that it did not leave to the jury the question whether the sidewalk was reasonably safe, is supplemented by ample instructions on this point given for the defendant, and the error is nonprejudicial." In Squiers v. Kansas City, 75 S. W. 194, court also held: "Error in plaintiff's instruction that if a loose plank rendered the sidewalk 'unsafe and defective' and plaintiff was injured thereby, to find for her, is cured by defendant's instruction, that defendant would not be liable merely because there was a defect or imperfection in the sidewalk, unless it was such that on account

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of it the sidewalk was not reasonably safe for travel." Many other cases might be cited of a like character.

It is proper therefore to hold under the foregoing rule that the error complained of was not prejudicial. The plaintiff's second instruction is similarly faulty. It is substantially like her number one. And we do not think it was misleading in view of what has heretofore been stated. Objections are made to other instructions of plaintiff but we do not think they are well founded. Nor did the court commit error in rejecting those of defendant not given.

For the reasons given the cause is affirmed. All concur.

JAMES M. CORSON, Appellant, v. JOHN A. WALLER, Administrator, etc., Respondent.

Kansas City Court of Appeals, February 1, 1904.

1. **ADMINISTRATION: Exhibition of Demand: Statute: Notice.** A notice of a demand against an estate set out in the opinion is held not to meet the requirements of section 188, Revised Statutes 1899, in that it does not state the "amount and nature of the claim."

2. ——: ——: ——: ——. Said notice of plaintiff's desire to establish his demand meets the requirements of section 197, Revised Statutes 1899, since it contained "copies of the instruments of writing on which the demand was founded."

3. ——: ——: ——: **Pleading.** No formal pleadings are required in the probate court, but common justice requires such a statement to be full and specific enough to apprise the administrator of the facts involved.

4. ——: ——: **Appeal: Amendment.** A cause of action may be amended in the appellate court to supply deficiencies or omissions, but no new item or cause of action can be added; and if the original demand is a mere nullity, it is not amendable.

5. ——: ——: ——: ——. A demand set out in the opinion, while defective and insufficient, is held susceptible of amendment.

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Appeal from Cooper Circuit Court.—*Hon. James E. Hazell,* Judge.

REVERSED AND REMANDED.

C. C. D. Carlos and *John Cosgrove* for appellant.

(1) The trial court committed error in sustaining motion to strike out plaintiff's amended statement. It was specific and fully advised defendant of all the facts constituting plaintiff's cause of action. Busch et al. v. Diepenbrock, 20 Mo. 568; May et al. v. Kloss, 44 Mo. 300. (2) The amended statement set forth the facts sufficiently explicit and had a judgment been rendered for plaintiff thereon, it would have barred him from recovering in another action. This was all that was necessary. Price v. Railway, 48 Mo. 389 and cases cited. Wencker, Admr., v. Thompson, Admr., 96 Mo. App. 66. (3) The original statement was sufficient. If this statement was not sufficiently definite defendant should have moved to compel plaintiff to file a more definite statement of his cause of action. It was not a ground of dismissal. Watkins v. Donelly, 88 Mo. 322; Maxwell v. Quimby, 90 Mo. App. 469.

W. M. Williams and *C. D. Corum* for respondent.

(1) The statute provides that in exhibiting demands against estates, the claimant shall state the amount and nature of his claim. R. S. 1899, sec. 188. The claim filed does not answer the requirement of law or of common sense. (2) The statement sued on here does not set forth the facts constituting a cause of action. It suggests nothing of the nature thereof. No court can determine what cause of action was intended to be stated. Therefore it can not be amended. Brashears v. Shrock, 46 Mo. 221; Breeman v. McMemany, 78 Mo. App. 122. (3) Pleadings, even in probate

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courts, must contain a statement of the facts and something of the nature of the claim. R. S. 1899, sec. 118; Seligman v. Rogers, 113 Mo. l. c. 660; Watkins v. Donnelly, 88 Mo. 322; Brashears v. Strock, 46 Mo. 221; Maxwell v. Quimby, 90 Mo. App. l. c. 474. (4) Although it should be held that the original statement of the appellant was susceptible of amendment, still the judgment ought to be affirmed, because it is shown that no demand was ever filed in the probate court. "Appellate courts will always sustain a correct result, though such result may have been brought about by an erroneous process of reasoning." Ittner v. Hughes, 133 Mo. 679; Theile v. Railroad, 140 Mo. l. c. 335; Hewitt v. Steele, 118 Mo. 463; Wolf v. Dyer, 95 Mo. l. c. 550.

SMITH, P. J.—The plaintiff delivered to the defendant administrator the following notice:

"To John A. Waller, administrator of the estate of Wm. H. Glasgow, deceased: Take notice that at the next term of the probate court of Cooper county, Mo., to be held at the courthouse in the city of Boonville, in said county, on the second Monday of August, 1902, on the first day of said term, or as soon thereafter as I can be heard, I shall present to said court for allowance against said estate a demand founded upon the following, to-wit:

" 'October 15, 1900.

" 'Received of J. M. Corson the sum of $58.50 on the H. M. Keevil note.

" 'W. H. Glasgow.'

" 'December 13, 1900.

" 'Received of J. M. Corson the sum of $67.85 in full payment of the H. M. Keevil note.

" 'W. H. Glasgow.

" 'June 25, 1902. " 'J. M. Corson.'

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"State of Missouri, County of Cooper. ss.

"J. M. Corson, the above named claimant, makes oath and says, that to the best of his knowledge and belief he has given credit to the estate of William H. Glasgow, deceased, for all payments and offsets to which it is entitled and that the balance claimed is justly due. "J. M. CORSON.

"Subscribed and sworn to this 30th day of June, 1902. "C. C. D'CARLOS,
"Notary Public."

On which notice there was indorsed in writing by the administrator the waiver "of service of any notice on me of the presentation of the above demand to the probate court," etc. On August 11, 1902, the parties appeared before the probate court when and where there was a trial on the merits resulting in judgment for defendant. An appeal was taken by plaintiff to the circuit court where plaintiff by leave of court filed an amended statement which was as follows:

"Plaintiff by leave of court first had and obtained, for his amended statement herein states that he and Wm. H. Glasgow, deceased, on the — day of ——, 1898, executed and delivered their joint note to H. M. Keevil for the sum of $117; that in order to settle and pay off said note he paid to Wm. H. Glasgow, deceased, on the 15th of October, 1900, the sum of $58.50 and on the 13th of December, 1900 . . . the further sum of $67.85, both of which sums so paid by plaintiff to said Wm. H. Glasgow, said Glasgow promised and agreed to pay and cause to be credited on the note to the said H. M. Keevil, which payments will appear by receipts dated on the dates above given and herewith filed and marked exhibits "A" and "B;" that said Glasgow failed and neglected to pay said sums to said H. M. Keevil, and failed to have said sums or either of them

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credited on said note so held by said Keevil; that since the death of said Glasgow the said Keevil instituted a suit against John A. Waller, as administrator of the estate of said Wm. H. Glasgow, and plaintiff on said note, before J. L. Stephens, Esq., a justice of the peace of Kelly township, Cooper county, Mo., and recovered judgment for the amount due on said note; that since then plaintiff has paid said judgment and costs, and he now asks judgment against the defendant Waller, as administrator of said Wm. H. Glasgow, deceased, to be levied of the goods and chattels of said estate in the hands of said administrator, for said sum of $126.35 with interest on $58.50 from October 15, 1900 and on $67.85 from December 13, 1900, and for costs." To which statement was appended the affidavit required by section 195, Revised Statutes.

The defendant thereupon filed a motion to strike the amendment from the files for the reason that plaintiff's original statement was a nullity and not susceptible of amendment, and which was by the court sustained. The defendant then filed a motion to dismiss the cause for the reason that plaintiff had filed in the probate court no sufficient statement of his cause of action, and for the further reason that the statement filed did not show the nature of his alleged demand, etc., which was sustained and judgment given accordingly, and from which plaintiff appealed.

The vital question raised by the appeal is, whether or not the statement of the demand exhibited to the administrator and subsequently presented to the probate court for allowance, and by that court heard and determined, was such as was susceptible of amendment. Section 188, Revised Statutes, provides, that any person may exhibit his demands against such estate by serving upon the executor or administrator a notice in writing stating *the amount and nature of his claim* with a copy of the instrument of writing or account upon

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which the claim is founded. Section 197, Revised Statutes, provides, that any person desiring to establish a demand against any estate shall deliver to the executor or administrator a written notice containing a copy of the instrument of writing or account on which it is founded, and stating that he will present the same for allowance, etc. Under section 188, providing how a demand may be exhibited against an estate, the notice given and quoted at the outset does not meet the requirements of that section in that it does not state *"the amount and nature of the claim,"* though it does set forth copies of the instruments of writing upon which it —the demand—is founded.

As notice of the plaintiff's desire to establish his demand, it did meet the requirements of section 197, supra, for it does contain "copies of the instrument of writing on which the demand was founded," etc. The notice on its face shows that its purpose was to procure the allowance against said estate of a demand founded on the instruments in writing therein copied. The plaintiff's claim or demand is founded on the receipts, but the statement of just in what way or how the same arose, or the decedent's estate became liable to plaintiff thereon, is not stated. The facts upon which the plaintiff claimed there was liability to him on said receipts should have been stated so as to fully advise the administrator of the nature of his claim. The notice did not advise the administrator what facts the plaintiff expected to prove in order to establish the liability of the estate to him. It is true that in probate courts formal pleadings are not required, yet, common justice requires that the statement of a matter about which those in charge of the estate probably know nothing, should, when presented for allowance, at least be sufficiently full and specific to apprise them of the facts involved, so that they can be prepared properly to protect the interests confided to them, and thus prevent the

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allowance of unjust demands from swallowing up the estate. Watkins v. Donnelly, 88 Mo. 322.

The statement was unquestionably defective and insufficient; but, while this is so, was it unsusceptible to amendment? Was it, as defendant contends, as absolute nullity and such as to furnish nothing to amend? A statement of a plaintiff's cause of action may be amended in the appellate court to supply any deficiency or omission therein when by such amendment substantial justice will be promoted; but no new item or cause of action not embraced or intended to be embraced in the original statement, shall be added by such amendment. Section 4079, Revised Statutes. When a statement is so entirely barren as to state nothing at all—is a mere nullity—it is not amendable in the appellate court. Brashears v. Strock, 46 Mo. 221; Lamb v. Bush, 49 Mo. App. l. c. 388; Dahlgren v. Yocum, 44 Mo. App. 277.

While it may be that the statement here is bad and would not support a judgment, it can not be said that it is entirely barren, a nullity, and therefore not amendable. It sufficiently appears therefrom that plaintiff bases his claim on the receipts—they constitute the foundation of his claim. The facts showing just how and in what way the deceased's estate is liable to plaintiff on the receipts is omitted, but it seems to us that substantial justice would be promoted by allowing him to supply by amendment the omissions. Dahlgren v. Yocum, 44 Mo. App. 277; Lamb v. Bush, 49 Mo. App. l. c. 338; Brashears v. Strock, 46 Mo. 221. If these conclusions be correct it inevitably follows that the court erred in striking the plaintiff's amendment from the files and in dismissing the action.

The judgment will accordingly be reversed and cause remanded to be proceeded with in accordance with the view of the law herein expressed. All concur.

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WILLIAM TRIPPENSEE, Appellant, v. ERNEST BRAUN et al., Respondents.

Kansas City Court of Appeals, February 1, 1904.

1. **DEBTOR AND CREDITOR: Contractor and Subcontractor: Payments Without Authority: Instructions.** A contractor can not pay claims against a subcontractor until liens for such claims have been filed and action brought on them, unless such payment is made at the subcontractor's request, expressed or implied, or by his assent given after payment. An instruction is condemned for ignoring this rule.

2. **APPELLATE PRACTICE: Judgment: Bill of Exceptions.** If the transcript of the clerk shows there is a judgment that is sufficient to sustain the appeal; the filing of a bill of exceptions must be shown by the record proper, and this may be done in an amended abstract by a recitation to that effect.

Appeal from Cole Circuit Court.—*Hon. James E. Hazell*, Judge.

REVERSED AND REMANDED.

E. L. King and *James H. Lay* for appellant.

(1) When one party voluntarily pays the debt of another he can only recover of the party for whom he paid, in the way and manner and under the circumstances and showing as enunciated, contemplated and declared in instructions 6 and 8, as they read before the modifications and changes therein were made by the court. Watkins v. Richmond College, 41 Mo. 303; Morley v. Carlson, 27 Mo. App. 5; Heege v. Fruin, 18 Mo. App. 139. (2) It was error to refuse instructions 2 and 5. The claim of Braun that he paid the debts to protect the property from liens is not warranted by the facts—the contrary is true. Morley v. Carlson, 27 Mo. App. 5; Heege v. Fruin, 18 Mo. App. 139.

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Pope & Belch for respondents.

(1) No bill of exceptions was filed in this case, and what purports to be, in appellant's abstract, should be disregarded. This leaves nothing for the court to pass on. R. S. 1899, sec. 728; Shoe Co. v. Williams, 91 Mo. App. 511; Finlay v. Gill, 80 Mo. App. 458; Ricketts v. Hart, 150 Mo. 64; Scraper Co. v. Kolkmeyer, 91 Mo. App. 286. (2) It does not appear that judgment was rendered on the verdict, nor does it appear that any affidavit for an appeal was filed, and hence this court acquired no jurisdiction. Peters v. Edge, 91 Mo. App. 283; R. S. 1899, sec. 808; Harper v. Standard Oil Co., 74 Mo. App. 644. Nor does it appear that appeal was taken at same term. R. S. 1899, sec. 808; Thomas v. Ins. Co., 89 Mo. App. 12. The court will not go behind the abstract. Herman v. Daily, 74 Mo. App. 505; Ormiston v. Trumbo, 77 Mo. App. 310; Storage & Warehouse Co. v. Glassner, 150 Mo. 426; Butler Co. v. Graddy, 152 Mo. 441. (3) The printed matter served on respondents is nothing more than a statement. It does not comply with rule 15, and the appeal ought to be dismissed. Dixon v. Thomas, 91 Mo. App. 364; Brassfield v. Knights of Pythias, 157 Mo. 366.

BROADDUS, J.—The plaintiff's suit is to enforce a mechanic's lien. Plaintiff was a subcontractor, defendant Braun the contractor and defendant Parker owner of the property sought to be charged with the lien. The only questions arising in the case relate to certain setoffs pleaded by the contractor Braun. Under plaintiff's contract for work and material he was to have $1,080 and he claims that he did extra work which was of the value of $33. He credits defendant Braun with cash payments amounting to $625, and for two thousand bricks, $80.

Defendant Braun admits that plaintiff is entitled to a credit of $9 for extra work and no more, and asks credit for different sums among which are the follow-

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ing: $292.95 paid to B. H. Pohl; $125.30 overpayment made to plaintiff for work and materials on the Confederate Home at Higginsville; $9 for work and material on the house of one G. W. Gordon; and $20 overpaid on the house of one Schahill. The evidence tended to show that these payments were made at the instance and request of plaintiff, while the evidence of plaintiff was to the contrary.

The sole contention here is that the court committed error in the giving and refusing of certain instructions. Instruction four given for defendant is as follows: "The court instructs the jury that if they believe and find from the evidence that the plaintiff owed $292.95 for brick that was used in the construction of the Lester Parker house and that defendant Braun paid therefor at the request of the plaintiff, or that he consented to such payment, either before or after the same was made, *or that by the usual course of dealing between the plaintiff and defendant Braun, said Braun had a right to infer and believe, and did believe that he was authorized to pay such brick bill, and acting in good faith under such implied authority he paid such brick bill for plaintiff,* then the jury in making up their verdict will allow the defendant Braun a credit for the amount paid."

We have italicised that part of the instruction to which plaintiff excepts. It is settled law that "no person can make another his debtor without the consent of the party benefited; there must be a previous request, expressed or implied, or an assent or sanction given after the money is paid, or the act done." Allen's Admr. v. Richmond College, 41 Mo. 303. And it is not the duty of an original contractor to pay claims against the subcontractor until liens for such claims have been filed and actions brought on them. Morley v. Carlson, 27 Mo. App. 5; R. S. 1899, sec. 4223. Under the law as stated there being no evidence that the owner of the claim paid by the contractor had taken any step to en-

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force a lien against the building sought to be charged, the contractor Braun was not authorized to pay said claim unless by plaintiff's request, expressed or implied, or his assent given after payment. It is claimed that notwithstanding there was evidence that plaintiff authorized the payment before or sanctioned it after it was made, there was no evidence whatever that would justify the defendant Braun to infer that he had any such authority from the usual course of dealing between himself and plaintiff. Plaintiff's contention in that respect is well founded. The evidence related wholly to the payments in controversy and nothing was said as to the previous course of dealing between the parties, consequently there was nothing to base that part of defendant's instruction italicised, to the effect that the jury might infer that defendant had the authority to make the payment. The same error also occurs in instructions 5 and 9 given for respondents. And error was committed by the court in inserting in plaintiff's instructions 6 and 8 substantially the same theory.

The respondents insist that appellant's appeal should be dismissed because he has failed to comply with rule fifteen of this court. The original abstract failed to contain the judgment and the filing of a bill of exceptions. But the transcript of the clerk shows that there was a judgment, and that is held to be sufficient. The bill of exceptions which is made a part of the abstract states that such bill was filed. But it has been repeatedly held that such a recitation is not sufficient, as a bill of exceptions can not prove itself. There must be some order showing that it was filed. The amendment states however that it was duly filed. It is not necessary that a copy of the record showing it was filed should be in the abstract. The mere recitation of the fact is held to be sufficient. We hold that the abstract is sufficient.

For the reasons given the cause is reversed and remanded. All concur.

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MORRISON MANUFACTURING COMPANY, Appellants, v. ROACH & GREENE, Respondents.

Kansas City Court of Appeals, February 1, 1904.

1. **TRIAL PRACTICE: Counterclaim: Reply.** Where the defendant on dismissal of plaintiff's petition elects to prosecute his counterclaim, he becomes a plaintiff and the plaintiff a defendant, and the reply of the plaintiff becomes an answer in which he may set up his defenses or counterclaims, including even the cause of action pleaded in his dismissed petition; and section 4499, Revised Statutes 1899, supersedes the general rules governing the parties in their pleadings so far as is necessary to give effect to that section.

2. **APPELLATE PRACTICE: Presumption: Appeal From Order Granting New Trial: Bill of Exceptions.** On an appeal from an order granting a new trial the appellate court may examine any other ground for the motion than that assigned by the trial court in its order sustaining the motion, and must presume that the order granting a new trial was justified by law; and where there is a failure to bring up the bill of exceptions the appellate court will presume there was sufficient reason for sustaining the motion and affirm the judgment.

Appeal from Sullivan Circuit Court.—*Hon. John P. Butler,* Judge.

AFFIRMED.

W. F. Calfee and *R. N. Johnson* for appellants.

If plaintiff's original petition had not been dismissed, its replication and counterclaim would probably not have authorized the recovery of judgment against defendants but would have only extinguished their demand. Pattison's "Missouri Code Pleading," sec. 766; Coombs Co. v. Block, 130 Mo. 668.

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Childer Bros. for respondent.

(1) Plaintiff can not recover on a cause of action which is stated only in his reply, and not stated in his original petition. Pattison's "Missouri Gode Pleading," p. 394, sec. 763; Crawford v. Spencer, 36 Mo. App. 78; Stepp v. Livingston, 72 Mo. App. 175, l. c. 179; Hill v. Mining Co., 119 Mo. l. c. 30. (2) The reply of plaintiff to defendant's set-off and counterclaim as to the note of $587.46, was clearly a departure from its original petition, and is not admissible. Bliss, Code Pleading (2 Ed.), sec. 396; Magruder v. Admire, 4 Mo. App. 133; Suman v. Inman, 3 Mo. App. 596; Pattison's "Missouri Code Pleading," p. 354, sec. 676; Mortland v. Holton, 44 Mo. 58. Where there is a single defendant and he interposes a set-off to plaintiff's demand, the plaintiff can not set up in his reply another demand distinct from that on which his action is based, and which he might have included in his petition. Pattison's "Missouri Code Pleading," p. 354, sec. 676; Dawson v. Dillan, 26 Mo. 395.

ELLISON, J.—Plaintiff sued defendants in two counts on two promissory notes, one for $149.30 and the other for $587.46. Defendants had made an assignment prior to the institution of the suit and plaintiff had presented and had both notes allowed by the assignee, thus merging them into judgments. Defendants answered plaintiff's petition admitting the execution of the notes, but setting the allowance and merger as in bar of an action on the notes themselves. They further answered by setting up that they had delivered certain valuable collateral to plaintiff with the notes. That enough of them had been collected to pay the notes. Defendants then pleaded a counterclaim and demanded an affirmative judgment against plaintiff for $449.30. Plaintiff then filed an amended petition in which it declared on the judgments. On motion of defendants this

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amended petition was stricken out on the ground that it changed the cause of action in the original petition. Plaintiff thereupon dismissed its original petition and filed a replication to defendants' answer, denying defendant's counterclaim and again set up the judgment before the assignee "by way of counterclaim to defendants' counterclaim;" in other words, plaintiff stated in this replication the cause of action on the judgments as had been alleged in its amended petition and asked judgment for the amount of such judgments. Defendants then filed their reply or answer to plaintiff's reply. The cause was then referred to E. B. Fields, Esq., as referee. Mr. Fields in due time made his report wherein he found for plaintiff the sum of $385.81. Defendants filed objections to the report in which many exceptions were taken thereto, but the trial court overruled them and confirmed the report and rendered judgment for the amount so found. Defendants then filed their motion for new trial setting up several grounds why it should be granted, among others, that the court "erred and improperly permitted plaintiffs after its petition and amended petition had been held bad, to file and maintain by way of replication, a set-off and counterclaim, the same matter as alleged as a cause of action in its original petition." The court sustained the motion on that ground and plaintiff appealed from that order to this court.

The action taken by the trial court on the case made as just set out, involves a construction of section 4499, Revised Statutes 1899, which reads as follows: "Whenever a set-off or counterclaim shall be filed in an action, as provided in this chapter, it shall be deemed in law and treated as an independent action begun by the defendant against the plaintiff, except in the cases enumerated in section 4488 of this chapter; and, the dismissal or any other discontinuance of the plaintiff's action, in which such set-off or counterclaim shall have been filed, shall not operate to dismiss or discontinue such set-off

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or counterclaim, but the defendant so filing such set-off or counterclaim may, notwithstanding such discontinuance or dismissal of the plaintiff's action, prosecute the same against the plaintiff in the same manner and with the same force and effect as if he had originally begun the action on his set-off or counterclaim against the plaintiff; and, in such case, the defendant so prosecuting such set-off or counterclaim shall be subject to all the rules applicable to plaintiffs in civil actions and other procedure, and the set-off or counterclaim shall be proceeded with, in all respects, as if the action had originally been begun by the defendant against the plaintiff."

In our opinion the first view entertained by the trial court was correct and that it erred in granting the motion for new trial on the ground that plaintiff could not set up in its replication to defendants' answer and counterclaim, the same matter that was the foundation of its action as set out, whether in the original petition which it dismissed, or in the amended petition which was stricken out. The effect of the statute is that where a plaintiff dismisses his action, anything on defendant's part which he has claimed in his answer and which was proper matter of set-off, or of counterclaim to plaintiff's cause of action, should be considered as though it was the basis of an action by such defendant, as though he was a plaintiff, against such plaintiff as though he was a defendant. When a defendant, after the petition has been dismissed by the plaintiff, shall elect to continue to prosecute his set-off, or his counterclaim notwithstanding such dismissal, he takes upon himself the prosecution of an action in which he becomes to all intents and purposes a plaintiff, and the plaintiff becomes a defendant. The statute aforesaid reads that, such defendant shall be subject to all the rules applicable to plaintiffs in civil actions and other procedure and that his claim shall be proceeded with in all respects as if he had originally begun the action against the plaintiff.

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The statute is as broad as could well be made and we can not see any reason why the plaintiff should not be allowed to use as set-off or counterclaim, if it be otherwise proper, the same matter upon which his petition was based in the first instance, or as amended. The opportunity to do so is given him by the defendant who elects to go on with his counterclaim or set-off. He may deprive the plaintiff of such privilege by going out of court with him.

Defendants, to sustain the reason given for granting the new trial, urge several reasons founded on the ordinary rules of pleading, among others, the rule in this State that there can be no recovery on a cause of action which first appears stated in the reply and which are not within the general scope of the petition. Crawford v. Spencer, 36 Mo. App. 78; Stepp v. Livingston, 72 Mo. App. 175, 179; Hill v. Mining Co., 119 Mo. l. c. 30. By this contention it is seen that defendants regard the rights of plaintiff as they would be unaffected by the statute. But by that statute plaintiff and defendants change places, and plaintiff becomes for all practical purposes the defendant, and what counsel call the replication is really an answer. That statute was enacted to meet the special phase of such a case as it refers to; and, in so far as is necessary to effectuate its purpose in such case, it must be held to supersede the general rule governing the parties in their pleading, whether such rule be founded on the general statute or on decisions of the courts.

There is a statute of the State of Iowa, certainly no broader than ours, which reads: "In any case where a counterclaim has been filed, the defendant shall have the right of proceeding to trial thereon, although the plaintiff may have dismissed his action or failed to appear." A case arose in which the plaintiff brought his bill to enjoin the defendant from foreclosing a mortgage to secure plaintiff's notes on the ground that they had been paid and asking that they be cancelled. The

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defendant answered denying the payment and asking judgment on the notes. Plaintiff dismissed his bill, and defendant still insisting on judgment on his notes, the plaintiff was permitted by his reply, "in the nature of an answer" to defend on the same ground set up in his bill which he had dismissed. Gardner v. Halstead, 71 Iowa 259.

Defendants seek to avoid the force of that decision by suggesting that by the general statute of Iowa "any number of defenses negative or affirmative are pleadable to a counterclaim, and such affirmative matter of defense in reply shall be sufficient in itself and must intelligibly refer to the part of the answer to which it is intended to apply." But the general statute permits no more than the section of our statute which we are now construing in so far as it affects the point under consideration. For, as we have already pointed out, our statute makes a defendant with his counterclaim, a plaintiff seeking to obtain judgment upon it; and it makes of the plaintiff a defendant with all the rights of any other defendant who had been sued on a demand.

But defendants urge another point which we conclude entitles them to an affirmance of the judgment. The motion for new trial, as has been stated, included more than the one cause assigned for granting it. Among other reasons was one that " the court erred in sustaining and confirming the report of the referee." There was a bill of exceptions containing the report and the evidence had at the trial and the declarations of law. The plaintiff has not brought up the bill of exceptions nor has it furnished us with an abstract of it. We have no means of ascertaining whether any other reason assigned in the motion for new trial was well founded.

The law is, that we may examine any other ground of the motion for new trial than that assigned by the trial court in order to sustain the action of such court. Lovell v. Davis, 52 Mo. App. 342, 347; Hewitt v. Steele, 118 Mo. 463; Gray v. Railway, 54 Mo. App. 671; Saville

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v. Huffstetter, 63 Mo. App. 273. We must presume that the order granting the new trial was justified by the law, though we may not sustain the reason which was given for making it. And we have already decided that it was the duty of an appellant to show to us that the order was not sustained, not alone by the reason given, but by the law for any other reason alleged. Ensor v. Smith, 57 Mo. App. 584.

The plaintiff not having brought before us the entire record—having omitted that part which, defendants contend, would show the order granting the new trial was proper, we are not authorized to say that it was improper and hence we order its affirmance. The other judges concur.

JOHN R. DENNIS, Appellant, v. C. TOM BAILEY, Respondent.

Kansas City Court of Appeals, February 1, 1904.

1. **JUSTICES' COURTS: Replevin: Jurisdiction: Residence.** A justice of the peace has no jurisdiction to replevin property in his township where both parties are non-residents of his county; and under section 4486, Revised Statutes 1899, the jurisdiction in such case is alone in a court of record.

2. **JURISDICTION: Appearance.** Where a court has no inherent jurisdiction of the subject-matter the appearance of the parties at the trial will not confer such jurisdiction.

Appeal from Sullivan Circuit Court.—*Hon. John P. Butler,* Judge.

AFFIRMED.

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Wilson & Clapp and *M. Bingham* for appellant.

(1) The justice had jurisdiction of the subject-matter of the action. Griffin v. Van Meter, 53 Mo. 430; Rosenheim v. Hartsock, 90 Mo. l. c. 365; Hagerman v. Sutton, 91 Mo. l. c. 531; Stearns v. Railroad, 94 Mo. l. c. 322; Posthlewaite v. Ghiselin, 97 Mo. l. c. 424; State ex rel. v. Smith, 104 Mo. 419; Spurlock v. Railroad, 104 Mo. 658; Hope v. Blair, 105 Mo. l. c. 93; State ex rel. v. Neville, 110 Mo. 345; Musick v. Railroad, 114 Mo. 309; Howland v. Railroad, 134 Mo. l. c. 479; Livingston v. Allen, 83 Mo. App. 294; Railway v. Lowder, 138 Mo. 533; Meyer v. Ins. Co., 92 Mo. App. 392; Jaco v. Railroad, 94 Mo. App. 567; Eckerle v. Wood, 95 Mo. App. l. c. 386. (2) Having taken out subpoenas, filed and argued motions other than to dismiss for want of jurisdiction, and having elected to stay in court and try the case on its merits after his motion to dismiss for want of jurisdiction, was overruled, the defendant waived jurisdiction of his person. Schlatter v. Hunt, 1 Mo. 651; Hembree v. Campbell, 8 Mo. 572; Bohn v. Devlin, 28 Mo. 319; Orear v. Clough, 52 Mo. 55; Peters v. Railroad, 59 Mo. 406; Ivey v. Yancey, 129 Mo. l. c. 572; Baisley v. Baisley, 113 Mo. l. c. 551; State ex rel. v. Spencer, 164 Mo. l. c. 54; Davidson v. Hough, 165 Mo. l. c. 572; Speer v. Burlingame, 61 Mo. App. 75; Hardware Co. v. Riddle, 84 Mo. App. 275; State ex rel. v. Shelton, 84 Mo. App. l. c. 639; Jones v. Railroad, 89 Mo. App. l. c. 661. (3) When a party appears specially to object to the jurisdiction of the court over him, and his objection is overruled, if he wishes to still insist upon his objection he must keep out of court for all purposes except to make his objection. By appearing afterwards and contesting the case on the merits, he loses his right to contest the ruling of the court below on his objection to the jurisdiction on appeal. Work on jurisdiction of Courts, sec. 22; Speer v. Burlingame, 61 Mo. App. l. c. 83; Tower v. Moore, 52 Mo. 118.

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O. G. Williams and *E. R. Bane* for respondent.

(1) Both plaintiff and defendant being non-residents of Sullivan and residents of Grundy county, Missouri, the justice in Sullivan had no jurisdiction under section 3839, Revised Statutes. (2) Being an action in replevin, where the property was in a county other than the residence of both parties, the circuit court of the county where the property is situated had exclusive original jurisdiction. Section 4486, Revised Statutes. (3) The justice court being one of limited jurisdiction, created by statute, its powers limited and defined by statute strictly with the letter thereof, the lack of jurisdicion was and is inherent, and even though the circuit court was not possessed of exclusive jurisdiction, even consent of the parties could not vest the justice with jurisdiction. (4) There is no waiver in this case. Pearce v. Calhoun, 59 Mo. l. c. 273; Cones v. Ward, 47 Mo. l. c. 290; Tittering v. Hooker, 58 Mo. 593; Wernecke v. Kenyon, 66 Mo. 283; Ensworth v. Curd, 68 Mo. 282; Julian v. Ward, 69 Mo. 153; Wernse v. McPike, 76 249.

SMITH, P. J.—The facts agreed in this case are as follows:

"That this cause, originated before O. G. Allen, a justice of the peace of Bowman township, Sullivan county, Mo., and that it is a replevin suit for three head of cattle and 68 bushels of black oats valued at $99 in the affidavit. That said cattle were in said Bowman township, Sullivan county, State aforesaid, at the time of the institution of this suit and was seized under the writ of replevin in said township by the constable thereof. That at the time of the institution of said suit both plaintiff and defendant were and now are residents of Grundy county, Mo. And that at the trial before the said O. G. Allen the plaintiff and defendant, both in person and by attorneys, appeared before the said Allen and tried said

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cause by introducing evidence on the merits and arguing the case before the said Allen, the defendant first having appeared for the purpose of the motion only, filed a motion before said justice to dismiss and refuse to consider the cause for the reason that both plaintiff and defendant being non-residents of Sullivan county, Mo., and residents of Grundy county, Mo., the court therefore had no jurisdiction to hear or determine the cause. This motion the court overruled after which the parties proceeded to trial as above set out. The judgment of the justice was for the defendant and plaintiff appealed.

In the circuit the defendant renewed his motion to dismiss, the grounds thereof being the same as those contained in that filed before the justice, that is to say: that it being admitted of record that neither plaintiff nor defendant were residents of or lived in Sullivan county, the court by reason thereof was without jurisdiction to try the cause. This motion was sustained and judgment was given accordingly for the defendant, and from which the plaintiff appealed here. The sole question thus arising is whether or not the justice had jurisdiction? The jurisdiction of the circuit court was not original but derivative. If the justice was without jurisdiction it—the circuit court—had none.

It is well settled that justice's courts have only such jurisdiction as is expressly conferred upon them by statute. Bank v. Doak, 75 Mo. App. 332; Brownfield v. Thompson, 96 Mo. App. l. c. 342. If the justice before whom the action was brought had jurisdiction it was conferred by section 3839, Revised Statutes, which provides:

"Every action recognizable before a justice of the peace shall be brought before some justice of the township, either, first, wherein the defendants, or one of them resides, or in any adjoining township; or, second, wherein the plaintiff resides, and the defendants or one of them may be found; third, if the defendant is a non-

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resident of the county in which the plaintiff resides, the action may be brought before some justice of any township in such county where the defendant may be found; fourth, if the defendant is a non-resident of the State, or has absconded from his usual place of abode, the action may be brought before any justice in any county in this State wherein the defendant may be found. . . ."

It thus plainly appears that in a case like this where neither party is a resident of the county in which the action is brought that the statute confers no jurisdiction on the justice. By reference to article 6, chapter 43, Revised Statutes, it will be seen that the jurisdiction conferred by said section 3839 in no way is widened or extended by its provisions.

Smith v. Simpson, 80 Mo. 634, was where the residence of the plaintiff was Bollinger county and that of the defendant was St. Francois county. The action was begun before a justice of the peace of Madison county. In the course of the opinion by the court it was said: "Justices of the peace then must get their authority from the statute. That fixes the manner and place of bringing the suit, and prescribes the territorial jurisdiction in which suits before justices may be maintained. And there is no statute that I am aware of which authorizes a plaintiff, resident of one county to sue a defendant, resident of a different one, in a third county, where neither plaintiff nor defendant resides." Thompson v. Bronson, 17 Mo. App. 456, was where the action which was begun in Knox county for the recovery of the possession of property situate in that county and both parties to the action were residents of Lewis county. It was contended that the action was properly brought in Knox county for the reason that the property was found there. The court declined to uphold the contention, saying, "our statute provides that suits by summons, when the defendant is a resident of the State shall be brought, either in the county within which the defendant resides or the county within which

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the plaintiff resides and the defendant may be found. Revised Statutes 1879, section 3481. Actions for the claim and delivery of personal property are not excepted from this provision of the statute, either expressly or by implication.

The next succeeding section to that just referred to, that is to say, section 3482, Revised Statutes 1879, provided: "Suits commenced by attachment against the property of a person shall be brought in the county in which such property may be found." In 1887—Acts 1887, p. 229—this section was amended so as to read as follows: "Suits commenced by attachment against the property of a person, or in replevin or claim and delivery of personal property, where the specific property is sought to be recovered, shall be brought in the county in which such property may be found, and in all cases where the defendant in the actions in replevin or claim and delivery of personal property, is a non-resident of the county in which the suit is brought, service shall be made on him as under like circumstances in suits by attachment." This section as thus amended was carried into the revision of 1889 as section 2010 and made a part of article 3, chapter 33, of the Code of Civil Procedure. In the revision of 1899 the section was not only permitted to remain a part of the Code of Civil Procedure (article 3, chapter 8, Revised Statutes 1899) but was also bodily incorporated in chapter 86, relating to actions of replevin in courts of record, as section 4486.

It is thus seen that by the provisions of said section 4486, ante, that all actions for the claim and delivery of personal property (when it is sought to recover specific personal property) shall be brought in some court of record of the county where the property may be found, and when the defendant in such actions is a nonresident of the county in which the suit is brought, service may be made on him as under like circumstances in suits by attachment, or which, in other words, is the same thing, the exclusive and original jurisdiction in

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actions of replevin when both parties reside in a county or counties other than that in which the property is found is made to vest in the circuit court or some other court of record of the latter county. It results that in an action of replevin where the residence of the parties and the *situs* of the property is as here, that a justice has no jurisdiction.

After the adoption of said section 4486, supra, in an action of this kind where the residence of the parties and the *situs* of the property is as it is here conceded to be, it was not cognizable before a justice of the peace. In such cases the jurisdiction was by that section exclusively lodged in the courts of record of the county where the property was found, without reference to the value thereof or the amount of damages for the injury thereto, etc. If prior to the adoption of said section 4486 justices of the peace under any conditions had jurisdiction in an action of replevin where the residence of the parties, *situs* of the property, its value, etc., was as here, they were shorn of that jurisdiction by its adoption. After its adoption such actions were required to be brought in some court of record in the county where the property was to be found. Thereafter, justices of the peace had no more jurisdiction in such cases than in actions against an executor or administrator, or in slander, libel, malicious prosecution, false imprisonment, ejectment or in strictly equitable procedure. Section 4486, as already stated, is identical with section 563 of article 3, chapter 8 of the Code of Civil Procedure. Section 562 of this article and chapter provides where suits in courts of record shall be brought, and said section 563 was, no doubt, enacted to remedy or supply the defect, imperfections and insufficiency, not only in the former but also in section 3899 of article 2, chapter 43, Revised Statutes, relating to jurisdiction of justices of the peace as indicated by the adjudicated cases to which previous reference has been made. This action was accordingly brought in the wrong court—a court that

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was without jurisdiction of it. The lack of jurisdiction was inherent.

If this was so it is plain that the mere fact that the defendant appeared to the action and proceeded to the trial on the merits could not have the effect to waive the lack of jurisdiction any more than if the action had been that of slander, ejectment or some other of which the justice had no jurisdiction. The numerous cases relating to jurisdiction and waiver cited and relied on by the plaintiff are without application to a case of this kind where the lack of jurisdiction in the court is inherent.

Our conclusion is, that the ruling and judgment of the trial court was not erroneous, and accordingly must be affirmed. All concur.

MARY E. BRENT, Executrix, Etc., Appellant, v. HENRY CHIPLEY, Respondent.

Kansas City Court of Appeals, December 7, 1903, and February 1, 1904.

1. **ADMINISTRATION: Renting Real Estate: Statute: Emblements.** By section 130, Revised Statutes 1899, the executor may under the order of the probate court take possession of the real estate and rent the same to pay debts, but this will not deprive the devisee or his tenant of his emblements.

2. ———: ———: ———: **Possession.** The statute requires the executor under such an order to take possession and rent, and he is not authorized to step in and appropriate the contract made by the devisee with the tenant and collect the rents from the tenant.

3. ———: ———: ———: **Attornment.** When such order is made by the probate court the tenant may with the consent of the devisee attorn to the executor who may then collect the rents; but this case seems to have been tried on another theory.

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Appeal from Howard Circuit Court.—*Hon. John A. Hockaday*, Judge.

AFFIRMED.

John Cosgrove for appellant.

(1) The order of the probate court was authorized by section 130, R. S. 1899, and its effect was to place plaintiff in control of the real estate of the estate of James H. Porter, deceased, during two years, unless the debts of the estate were sooner paid. (2) The order of the probate court authorized plaintiff to maintain ejectment for the possession of the land. Hall v. Bank, 145 Mo. 418; Bealy v. Blakes, Admr., 70 Mo. App. 234-236; O'Brien v. Ash, 169 Mo. 300; Thorp v. Miller, 137 Mo. 239. (a) If the plaintiff could recover the land it follows that she could recover the rent earned, and which became due ofter the date of the order. (b) Plaintiff under an order of the probate court to lease lands, could maintain an action of unlawful detainer. Lass et al. v. Eisleben, 50 Mo. 122; Eoff v. Tompkins, 66 Mo. 225; Bank v. Field, 156 Mo. 310. (3) Personal property constitutes the primary fund out of which the debts of the estate are to be paid. In the event of a deficiency, however, the real estate must be resorted to, and the heirs and devisees take subject to the contingency of having to pay the debts, if they exist. Lewis v. Carson, 93 Mo. 587; Priest v. Spier, 96 Mo. 111. (4) Defendant was notified that Gibson was no longer authorized to collect rent and the subsequent payment of the rent to him, if it was ever paid, did not release defendant from liability to pay plaintiff the rent for the year 1902. Upton et al. v. Jameson, 67 Mo. 234; State ex rel. Walker v. Walker, 88 Mo. 279; Mechem on Agency, sec. 229.

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Sam C. Major and *W. W. Kingsbury* for respondent.

(1) Defendant was a resident of the residuary legatees. An attornment by him to plaintiff would have been void unless made: (a) With the consent of the landlord. (b) Pursuant to or in consequence of a judgment at law, or decree in equity, etc. (2) There is no allegation or proof that the residuary legatees ever consented to an attornment by defendant to plaintiff. (3) The order of the probate court was neither a judgment at law nor a decree in equity. R. S. 1899, sec. 768; R. S. 1899, sec. 766; State ex rel. v. Klein, 140 Mo. 502. Even if defendant had promised to pay the rent to plaintiff—which the court found he did not—such attempted attornment would have been void, and defendant could not be bound thereby. Plaintiff's suit was brought under sections 4130 and 4131, R. S. 1899. To authorize a proceeding under these sections, there must exist the relation of landlord and tenant. The parties to the suit must have been the parties to the contract or their privies. R. S. 1899, sec. 4130; Logan v. Byers, 76 Mo. App. 559; Pierce v. Rollins, 60 Mo. App. 497; 18 Am. and Eng. Ency. Law, p. 436; Winkelmeyer v. Kotzberger, 77 Mo. App. l. c. 121. Plaintiff's remedy was unlawful detainer. A judgment for the plaintiff in such action would have authorized an attornment to plaintiff, and would have relieved him of any liability to his landlords. R. S. 1899, sec. 4112; R. S. 1899, sec. 3321 et seq. The judgment of the court below was for the defendant. The appellate court will indulge every presumption in favor of the correctness of the findings of the trial court. Wiggens v. Hammond, 1 Mo. 121; Drug Co. v. Self, 77 Mo. App. 284; Baumhoff v. Railway, 171 Mo. 120.

ELLISON, J.—This action was instituted before a justice of the peace under the landlord and tenant

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statute (secs. 4130, 4131, Revised Statutes, 1899) to recover the possession of certain real estate situated in Howard county. The judgment on appeal to the circuit court was for the defendant.

It appears that the farm was formerly owned by James H. Porter. That he died and the premises then became the property of his devisees under the terms of his will. That George D. Gibson was acting as agent for the devisees and for several years had rented the premises to the defendant and again rented them to him from March, 1902, to March, 1903, for $150, due January 1, 1903. The personal property left by Porter having proved insufficient to pay his debts, the probate court, under the provisions of section 130, Revised Statutes, 1899, on February 12, 1903, ordered the plaintiff, as executrix, to take charge of and rent the farm whereby she might obtain further assets to use in the discharge of debts of the estate. Plaintiff charges that on March 3rd, following, she notified Gibson and the defendant of the order of the probate court and that Gibson surrendered all claims of agency for the children and that defendant attorned to her by recognizing her and agreeing to pay her the rent money as agreed upon with Gibson, viz.: $150, when it should become due at the end of the year. That afterwards defendant refused to pay said sum, whereupon the plaintiff instituted the present action as stated.

The determination of this case depends upon the construction to be placed on section 130 aforesaid. It reads as follows:

"No administrator or executor, except an executor acting under power conferred by will, or as provided in section 257 of this chapter, shall rent or control the real estate of the deceased, unless the probate court having jurisdiction shall be satisfied that it is necessary to rent said estate for the payment of debts, and make an order of record requiring such administrator or executor to take possession of and rent the same for a pe-

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riod not exceeding two years; and upon such order, such executor or administrator may prosecute and maintain any action for the recovery of such real estate in the same manner and with like effect as the testator or intestate might have done in his lifetime."

Without this statute the administrator would have no right to the land, its rents or profits. The land, its possession, rents and profits belong to the heir or devisee and he, of course, may rent or lease it. Hall v. Bank, 145 Mo. 418; Bealey v. Blake's Admr., 70 Mo. App. 234. If he does so, the tenant on account of this statute will hold by an uncertain tenure. His right obtained from the heir is liable to be cut off by the contingency of an order of the probate court for the purposes mentioned in the statute. The statute should not be construed as meaning that the tenant could be disturbed in growing and gathering the crop which he had sown at the time the order of the probate court became effective. It is the policy of the law in the interest of agriculture, to permit the tenant to reap what he sows. The statute reads that the administrator must take possession of the premises and rent them. It does not mean so unreasonable a thing as that the administrator could deprive the tenant of his emblements.

But in this case the plaintiffs are not seeking to disturb the right of this defendant tenant to his emblements; they seek to hold him for the rent he agreed to pay the heir. The statute reads that upon obtaining the order the executor or administrator shall take possession and rent. It is not pretended that the executrix did either. She made no effort to obtain possession neither did she rent it. She therefore failed in that respect to bring herself within the terms of the statute and having failed she has not put herself in position to demand rent of the defendant. She had no right to step in and appropriate a contract made by other parties.

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Defendant insists that the case is not one in which there can be an attornment such as is known to the statute and adjudications thereunder. Section 4112, Revised Statutes, 1899; Dausch v. Crane, 109 Mo. 335. But plaintiff contends, and there was evidence tending to support the contention, that whether a technical attornment or not she notified the agent who had the farm in charge for the devisees and who rented it to defendant that she proposed to take immediate charge of the land and to appropriate the rent; that the agent consented, and that she afterwards notified the defendant and that she was entitled to the rent under the order of the probate court and that he consented to pay it to her. In short, it is plaintiff's contention that the devisees and the defendant consented that she take charge of the land as rented and receive the rent therefor. We see no reason why that might not be legally done. But in this case the court from the declarations of law given, must have found the fact to be that the agent and the defendant did not so understand it.

Our conclusion is, that there is no way in which we can justify ourselves in overturning the judgment and it is accordingly affirmed. All concur.

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J. T. B. REDMOND, Appellant, v. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, November 23, 1903, and February 1, 1904.

1. **RAILROADS: Killing Stock: Entering on Track.** It is the place where animals come upon the railroad track that determines the liability, and not where they are killed; and a railroad company is not required to fence its tracks at its stations and is not liable for stock entering on its tracks there and passing over bridges to another part of the track where it was killed.
2. ———: ———: **Fencing: Negligence.** A railroad company is not liable for killing stock where its track is not, but might be, fenced, unless there is proof of negligence.
3. ———: ———: **Negligence: Appellate and Trial Practice.** The question whether an engineer might have seen stock on the track in time to avoid killing it can not be raised for the first time in the appellate court, and a trial court is not required to instruct on different phases arising in a case unless asked to do so.

On Motion for Rehearing.

4. **TRIAL PRACTICE: Special Finding: Instructions.** The statute requiring the court to state in writing the conclusions of facts found separately from the conclusions of law, does not require the court to find on every phase of the case unless its attention is called thereto in a proper manner; and the appellate court will not reverse unless the matter is called to the attention of the court below.

Appeal from Howard Circuit Court.—*Hon. John A. Hockaday*, Judge.

AFFIRMED.

Webster Gordon for appellant.

(1) The trial court's second conclusion of law, it being the third paragraph of its special finding of law and fact, is illegal and erroneous. The court finds as a

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matter of law that it was the duty of the engineer operating the train that killed the mules, to have used all effort and skill to have stopped the train and avoid striking and killing the mules, after he saw them ahead of him on the track. Spencer v. Railway, 90 Mo. App. 91; Hill v. Railway, 49 Mo. App. 534; Hill v. Railway, 121 Mo. 477; Buckman v. Railway, 83 Mo. App. 129; Livingston v. Railway, 170 Mo. 473. (2) The trial court at the request of the defendant, gave instruction numbered one, which is a demurrer to all the evidence bearing on the third count of the petition. It is still reversible error to do so, and the verdict and judgment of the trial court can not stand. Lincoln v. Railway, 75 Mo. 27; Straub v. Eddy, 47 Mo. App. 189; Bricker v. Railway, 83 Mo. 394. (3) Instruction numbered two given by the court at request of the defendant is erroneous as to the first count of plaintiff's petition. Meadows v. Railway, 82 Mo. App. 83; Radcliff v. Railway, 90 Mo. 127; Clarkson v. Railway, 84 Mo. 593; Evans v. Railway, 67 Mo. App. 255; Vail v. Railway, 28 Mo. App. 372. (4) The instruction last considered is also erroneous as to the second count of the petition which is based upon our double damage statute which requires all railroads to fence all places along its line. (5) The court's finding of law and fact is erroneous and insufficient. Hamill v. Talbott, 72 Mo. App. 33; Nichols v. Carter, 49 Mo. App. 401; Vette v. La Barge, 64 Mo. App. 179, 185; Freeman v. Hemenway, 75 Mo. App. 617, 621; Downey v. Railway, 94 Mo. App. 137; Kirkland v. Railway, 82 Mo. 466; Morris v. Railway, 58 Mo. 78; Railway v. Clark, 121 Mo. 183; Prather v. Railway, 84 Mo. App. 86; Schafer v. Railway, 76 Mo. App. 131.

George P. B. Jackson for respondent.

(1) There is nothing in the point made by the appellant that the court's second finding of law con-

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cerning the duty of the enginemen if they might have discovered the mules, because it is admitted all around in the case that the mules were actually discovered. The cases cited by appellant only apply where it is claimed an animal was not discovered—but it might have been. (2) The first instruction or declaration of law is to be construed in connection with the special findings to ascertain the theory of the court in disposing of the case. The judge was in this case the trier of the fact. (3) The appellant has misconceived the case and the statute when he says a railroad will be held guilty of negligence for not fencing at a station, although to do so would interfere with the public and endanger employees. The cases he cited do not so hold—while it has been repeatedly held to the contrary. Pearson v. Railroad, 33 Mo. App. 543; Jennings v. Railroad, 37 Mo. App. 652; Crenshaw v. Railroad, 54 Mo. App. 233; Grant v. Railroad, 56 Mo. App. 65; Webster v. Railroad, 57 Mo. App. 451; Hurd v. Chappell et al., 91 Mo. App. 317. The cases cited under the previous point condemn the contention in point IV of appellant's brief. The "switch limits" include a reasonable length of track outside of the switch or head block. (5) The findings fully covered all the counts of the petition and every question of law and fact involved in the case.

BROADDUS, J.—The plaintiff sues for damages for the killing of two of his mules by defendant, the petition being in three counts. The first alleges that the animals came upon defendant's track and were killed at a point where defendant's railroad was not fenced, as required by law. Plaintiff prays for single damages and for a reasonable attorney's fee as provided by sections 1106-07, Revised Statutes, 1899. The second count is for double damages under section 1105, Revised Statutes 1899. And under the third count, plaintiff seeks to recover damages for the negligent killing of said animals by defendant. A jury was waived and the cause

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tried by the court. The finding and judgment was for defendant and plaintiff appealed.

At the request of the defendant the court gave the following instructions:

"1. The court instructs you that upon all the evidence bearing upon the third count of the petition the plaintiff is not entitled to recover and your verdict must be for the defendant on that count.

"2. The court instructs you in reference to the first and second counts of the petition that if you believe from the evidence that the plaintiff's mules were struck at a point on defendant's railroad within the switch limits of the station of Huntsdale and that the length of the track set apart and used by the defendant as its switch at said station was unnecessary (necessary) for the transaction of the defendant's business at said station or for the convenience of the public in transacting business thereat or for the safety of the men engaged in operating trains then the defendant was not required to fence its tracks at said place and the plaintiff can not recover on said counts."

By request of plaintiff the court made a finding of facts as follows:

"First. As matters of law the court finds that the defendant was not required to fence its tracks at the station at Huntsdale, if such fencing would interfere with the transaction of the business of said company with the public or endanger the lives and safety of its employees and officers in operating its cars.

"Second. As a matter of fact the court finds that the fencing of said road at the Huntsdale station would have interfered with the business of said road with the public and endangered the lives and safety of its employees and officers in operating the same.

"Third. As a matter of law the court finds that it was the duty of the engineer operating the train which killed the mules in question to have used all reasonable effort and skill to have stopped the train and avoided

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striking and killing said mules after he saw them ahead of him on the track.

"Fourth. As a matter of fact the court finds that said engineer operating said train did use reasonable care and skill to prevent the train from striking the mules after he first saw them on the track."

The evidence discloses that the animals came upon the track within the switch limits of the station and were killed after they had passed such limits at a bridge where the track crosses a stream. As to whether the engineer in charge of the locomotive could have seen the animals in time to avoid killing them, or that he in fact did see them before they were struck by the engine, the evidence is somewhat conflicting.

As the animals came upon the track within the switch limits the fact that they were killed at a point beyond such limits and where the defendant was required to fence would not render defendant liable under either the first or second counts. The defendant was required to fence its tracks at the station. Loyd v. Railway, 49 Mo. 199; Edwards v. Railway, 66 Mo. 567; Grant v. Railway, 56 Mo. App. 65; Morris v. Railway, 58 Mo. 78. And it is the place where animals come upon a railroad track that determines the liability of the company and not where they are injured or killed. Hurd v. Chappell et al., 91 Mo. App. 317, and authorities cited.

The finding of the court that the place where the animals came upon defendant's track was within the switch limits, and substantially that such switch limits were requisite for the business of the company and public and for the safety of the railroad employees, is conclusive on the question of the reasonableness of the length thereof.

The plaintiff was not entitled to recover under section 2867 of the Damage Act because the animals did not get upon the track at a point where defendant although not required to fence yet might have done so without

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materially interfering with the handling of defendant's trains, unless there was proof of negligence. Webster v. Railway, 57 Mo. App. 451; Pearson v. Railway, 33 Mo. App. 543; Jennings v. Railroad, 37 Mo. App. 651.

The court found that the engineer operating the train used reasonable care and skill to prevent it from striking the mules after he first saw them on the track.

If it was a pertinent inquiry whether the engineer could have discovered the mules on the track by the exercise of reasonabe care in time to have prevented the killing, it was not raised by the plaintiff. He asked no instruction raising such issue, consequently it is not permissible for him to raise such issue for the first time in this court. The instructions and declarations of law given appear to be unexceptionable. Under our system of practice as construed by the courts the trial court is not required to instruct upon the different issues arising in a case unless asked to do so.

Finding no error in the record the cause is affirmed. All concur.

OPINION ON MOTION FOR REHEARING.

BROADDUS, J.—The motion is based upon two grounds, the second of which has no merit whatever. We will therefore confine our attention to the first, which is as follows: "Because the opinion in this cause, in holding that the appellant after having requested the trial court to state its findings of fact and conclusions of law separately as provided by section 695, Revised Statutes 1899, was nevertheless required to ask an instruction on common law negligence for failure to exercise ordinary care to discover the stock on the track in time to avoid its injury, and for that reason is precluded from raising such question on appeal, is in conflict with the following decisions of this court and also of the Supreme Court, which same this court must have inadvertently overlooked. Then follows a list of numerous cases cited.

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Under the statute in question it is made the duty of the trial court upon request of a party to a suit to "state in writing the conclusions of facts found separately from the conclusions of law." It is therefore insisted that for a failure of the court to find all the facts and conclusions of law thereon is error. We do not think the statute should be so construed for the effect would be to inculcate trickery by permitting a party remaining silent, when he should speak, to take advantage of an oversight or omission of the court to find some particular fact and conclusion of law thereon. As said in the original opinion herein, it became the duty of the appellant to have asked the court to find the fact and give its conclusion of law thereon. And because the court was asked to find the facts and conclusions of law did not relieve him of the duty of rectifying any omission made by the court. And where the judgment is supported, as in this case, by the facts and law as declared by the court, it ought not to be disturbed for the cause assigned. And it ought not to be disturbed for the further reason, that the matter was not called to the attention of the trial court in plaintiff's motion for a rehearing so that the omission could have been remedied. Motion overruled. All concur.

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GEORGE S. HOWELL & CO., Respondent, v. JEROME DICKERSON, Appellant.

Kansas City Court of Appeals, February 1, 1904.

1. **SALES: Breach of Contract: Measure of Damages: Remittitur.** Defendant sold plaintiff apples in the orchard which he was to pick and plaintiff to pack in barrels. Defendant refused to let plaintiff have the apples. *Held,* measure of damages was the difference between the market price on the day of delivery and the price agreed to be paid at the place of delivery, less the cost of barrelling the apples; and an instruction omitting the deduction of the cost of barrelling was error and a remittitur was properly entered for that amount.

2. ———: ———: **Failure of Evidence: Action.** By the terms of the contract plaintiffs were to pick 150 barrels a day, but there was no evidence that they did so. *Held,* immaterial since the defendant did not give them an opportunity to perform their contract; and besides had they failed in that respect, plaintiff would have had his action therefor.

Appeal from Polk Circuit Court.—*Hon. Argus Cox,* Judge.

AFFIRMED.

C. H. Skinker and *G. A. Watson* for appellant.

(1) When an action is brought on a contract, a performance of its terms in every essential particular must be shown, before a recovery can be sustained. March v. Richards, 29 Mo. 99; Eyerman v. Cemetery Ass'n, 61 Mo. 489. Plaintiff must allege and prove performance on his part of the whole contract. St. Louis v. McDonald, 10 Mo. 609; Billups v. Daggs, 38 Mo. App. 367. There is therefore a total failure of proof of performance on the part of plaintiff of an essential part of the contract. There were some other guesses made

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by the witness as what they might have done, but what they did do, stands an indisputable witness against them. (2) The plain letter of the contract shows Howell & Co. were to receive and pack the apples in barrels, the labor and barrels to be paid for by them. This instruction directs the jury to ignore this provision of the contract and directs the jury to allow as damages the difference between the price of the apples in the orchard and the price in barrels at the market, thus requiring the defendant to pay for the barrels and for the packing. (3) The court endeavored to cure the error of this instruction by directing a remittitur of $198.35 but we submit that it is impossible for the court to arrive at the amount of damages allowed by the jury on account of this erroneous instruction. How many barrels did the jury find that the orchard contained?

Patterson & *Patterson* for respondent.

(1) The evidence as to the market value of apples on October 1st, was given with reference to the Springfield market on that date. (2) Our position is that this instruction, when considered in connection with the above excerpts of the record, is good as far as it goes. Instructions which are good as far as they go, but do not cover the whole case, amount, in civil cases, only to non-direction and not to error, and it is the duty of the other party to ask proper instruction to supply the shortcomings of those asked by his adversary. Bank v. Ragsdale, 171 Mo. 186; Geisman v. Electric Co., 173 Mo. 655; Tethrow v. Railroad, 98 Mo. 74; Hall v. Hall, 107 Mo. 101; Mitchell v. Bradstreet, 116 Mo. 226; Nolan v. Johns, 126 Mo. 159; Warder v. Henry, 117 Mo. 538; Doyle v. Railroad, 113 Mo. 280. (3) A respondent will be permitted to enter a remittitur in the Supreme Court to cure an error in the amount of his verdict. Warder v. Henry, 117 Mo. 530; Noble v. Blount, 77 Mo. 239. An excessive verdict may be remedied by a remittitur in

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the Supreme Court. Crawford v. Doppler, 120 Mo. 362; State ex rel. v. Hope, 121 Mo. 34; Trustees, etc., v. Hoffman, 95 Mo. App. 500; Rosenfeld v. Seigfred, 91 Mo. App. 184; Chitty v. Railway, 148 Mo. 77-80; Ice Co. v. Max Tamm, 90 Mo. App. 201; Swafford v. Pratt, 93 Mo. App. 638; Keen v. Schnedler, 92 Mo. 527.

BROADDUS, J.—This suit is founded upon the following contract, to-wit:

"This contract made on the 16th day of September, 1901, between Geo. S. Howell & Co., and Jerome Dickerson, witnesseth: That for and in consideration of the sum of five hundred dollars paid by said Geo. S. Howell & Co., and the further considerations herein named, Jerome Dickerson has sold to the said Geo. S. Howell & Co., all apples growing in the orchard of said Dickerson, situate three miles north of Springfield, Missouri, containing forty-six acres, and bounded on the north by Lyman and on the east by Garlick, which come within the following specification: that is to say, all apples in said orchard which shall measure two and one-fourth inches in diameter and be free from rot. No apple shall be rejected on account of any blemish, wormhole or insect sting appearing on the same unless same shall also be affected with rot. The said Dickerson shall pick and deliver said apples at the city of Springfield at such place as the said Howell & Co. shall designate within the limits of said city. Said delivery shall begin on the first day of October, 1901. The said Geo. S. Howell & Co. agree to pay the said Dickerson for said apples the sum of $2 per barrel of three bushels each, the said apples to be received and barrelled by the said Howell & Co. The said Howell & Co. agree to receive and barrel 150 barrels per day; the barrels to be furnished and paid for by said Howell & Co. The said Howell & Co. agree to pay for each 100 barrels when delivered and the said $500 this day paid shall be considered as payment for the last hundred and fifty barrels delivered

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under this contract. And should the said Howell & Co. fail or refuse to carry out their part of this contract the said $500 shall be retained by said Dickerson as liquidated damages for such failure. (Signed in duplicate Sep. 16, '01.) Jerome Dickerson, Geo. S. Howell & Co., by Geo. S. H.''

The petition alleges that the plaintiffs paid the $500 mentioned and offered to comply with the terms of the contract but that defendant failed to so do on his part; and that he drove plaintiffs' employees from the orchard and failed and refused to pick and deliver the apples and retained the $500 paid him.

There was evidence that on the last day of September the parties began picking and packing the apples, and that plaintiffs' employees were grading them down, as provided in the contract, but that defendant was dissatisfied with the way in which it was done; and that defendant delayed the packing of the apples somewhat because for want of ladders for the use of his pickers. That plaintiffs packed that day and on the next until between eight and nine o'clock when defendant discharged his pickers and ordered plaintiffs' employees to leave the orchard. During the time so employed they packed about seventy-five barrels. The evidence tended to show that plaintiffs were prepared to pack 150 barrels per day; that the orchard contained from 649 to 1,500 barrels of apples; that the cost of packing was about forty cents per barrel and that the lowest market price at Springfield, the place of delivery, was $2.75 per barrel.

Defendant's evidence tended to show that he dismissed his pickers and required plaintiffs' employees to leave or to comply with the contract as he understood it. He insisted that they rejected apples that should have been received under the contract.

The jury under the instructions of the court returned a verdict for plaintiff for $925.50, of which $500 was for the money paid on the contract, and the residue,

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$425, for damages for failure of defendant to deliver the apples.

The contention of defendant is that the court erred in instructing the jury as to the measure of damages. After instructing the jury to find for plaintiff the $500 the court instructed as follows: "And in addition, they will assess plaintiffs' damages at such sum, if any, as the weight of evidence shows was the difference per barrel between the market price October 1, 1901, and the contract price, viz.: $2 per barrel for such number of barrels coming up to the aforesaid standard as they shall find said orchard contained, and that in no event are they to assess plaintiffs' damages at a sum exceeding the sum sued for."

The objection to said instruction is, that it failed to tell the jury that they must deduct from the market price the costs of barrelling as the market price at Springfield was of apples in the barrel.

The error was discovered and the plaintiff in order to avoid its effect, entered a remittitur of $198.35 and the court rendered judgment for the amount of the verdict, less the sum remitted, viz.: $727.15. In order to arrive at this result the court assumed that the apples in the orchard amounted to 649 barrels. This was the least amount, as shown by the evidence, that the orchard contained. As we read the evidence, there was more. But under the finding the defendant could not have been injured for that reason but rather benefited. He is not in a condition to complain of the action of the court.

But defendant contends that there was a total failure of proof to sustain the finding, in this, that the contract provided that plaintiffs should pack 150 barrels per day, whereas the evidence does not show that with the means at hand they were able to do so. The trouble about this claim is, that the defendant did not give plaintiffs an opportunity to determine whether they could or could not. They had been delayed some on the first day because defendant was not prepared for them, and

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they were required to quit early the next day. And further, if in performing the contract plaintiffs failed to pack the 150 barrels a day and he was damaged thereby, he had his remedy. All he had to do was to comply or offer to comply on his part. But this course he did not pursue. On the contrary, he refused to deliver the apples, and ordered the plaintiffs' servants away. The jury on proper instructions found that he refused to deliver the apples.

The finding and judgment is for the right party and ought not to be disturbed. Cause affirmed. All concur.

PAT HARRINGTON, Respondent, v. WABASH RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, February 1, 1904.

1. **MASTER AND SERVANT: Safe Appliances: Ordinary Care: Negligence.** While a master should furnish reasonably safe appliances for the servant's work, he is not an insurer and is not required to furnish any particular kind of appliances, but merely to use ordinary care in selecting suitable appliances; and no inference of negligence can arise from the use of tools such as are ordinarily used for like purposes by persons engaged in the same sort of business.

2. ———: **Assumption of Risk: Method of Business.** The servant assumes the risks that are usually incident to the business, and the master may conduct his business in his own way; and where there is no negligence in the safety of the place or the appliances, the master is not liable for injuries to the servant.

3. ———: ———: **Servant's Experience: Waiver.** Where the servant knows the risks and hazards ordinarily incident to the master's business as conducted, he assumes such risks and waives his right to compensation for injuries.

4. ———: **Contributory Negligence: Evidence: Accident.** On a review of the evidence it is held, that the injury complained of by the plaintiff was the result of his own fault or an unforeseen casualty, and in neither event is the master liable.

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Appeal from Jackson Circuit Court.—*Hon. W. B. Teasdale*, Judge.

REVERSED.

Geo. S. Grover, Frank P. Sebree and *H. C. McDougal* for appellant.

(1) The court erred in overruling defendant's demurrer to the evidence and in giving plaintiff's instructions 1 and 3. Neither allegation nor proof warranted plaintiff's first instruction. Plaintiff's opportunity to know of the risk and danger is as strong as actual knowledge thereof, and bars a recovery. 4 Am. and Eng. Ency. of Law, 29-30; Beach, Contrib. Neg., sec. 139; Greenleaf v. Railway, 29 Iowa 46; Perigo v. Railway, 52 Iowa 276; Cummings v. Collins, 61 Mo. 520; Keenan v. Kavenaugh, 62 Mo. 232; Siela v. Railway, 82 Mo. 430; Roddy v. Railway, 104 Mo. 231, 250-1; Haley v. Jump, etc., Co. (Wis.), 51 N. W. 321; Carpenter v. Railway, 39 Fed. 315; Railway v. Herbert, 116 U. S. 642. (2) He can not close his eyes to such danger; and the same degree of ordinary prudence rests upon him as rests upon the master. Wormell v. Railway (Me.), 31 A. and E. Cas. 272, 276; Railway v. Mahoney, 4 Ill. App. 265, and cas. cit.; 2 Thomp., Neg., 1008; Bogenschutz v. Smith, 84 Ky. 330, 338; authorities below cited. (3) Plaintiff's injury was the result of his contributory negligence. This court should review "the whole evidence no matter by whom offered." Klokenbrink v. Railway, 172 Mo. 678, 683; see also authorities hereinafter cited. (4) Plaintiff's injury resulted from one of the risks of his employment and that risk he assumed. Holmes v. Brandenbaugh, 172 Mo. 53; Haviland v. Railway, 172 Mo. 106, 112; Holloran v. Iron Co., 133 Mo. 470; Nugent v. Milling Co., 131 Mo. 241; Bohn v. Railway, 106 Mo.

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429, 434; Fugler v. Booth, 117 Mo. 475; Steinhauser v. Spraul, 127 Mo. 541; Marshall v. Hay Press Co., 69 Mo. App. 256; Cunningham v. Journal Co., 95 Mo. App. 541; Judge Seymour D. Thompson in 56 Cent. Law Jour., 323, and cas. cit., notes; Beckam v. Brewing Co., 98 Mo. App. 555; s. c., 72 S. W. 710. (5) Even if it had been safer, or less dangerous, to transfer the cylinders on the transfer table than to carry them across the pit, that would be no evidence of negligence for the reason that the master is under no obligation to furnish to the servant the safest, or least dangerous, manner, appliance, machinery, or the like, in the conduct and management of his business. Muirhead v. Railway, 19 Mo. App. 634; Conway v. Railway, 24 Mo. App. 235; Cathorn v. Cudahy P. Co., 73 S. W. 279; Smith v. Railway, 69 Mo. 37; Bradley v. Railway, 138 Mo. 293; Minnier v. Railway, 167 Mo. 99; Holmes v. Brandenbaugh, 172 Mo. 53.

Hollis & Fidler for respondent.

(1) This cause was properly submitted to the jury and the verdict and judgment thereon fully supported by the evidence. Halliburton v. Railroad, 58 Mo. App. 27; Kane v. Falk Co., 93 Mo. App. 209; Monahan v. Coal Co., 58 Mo. App. 68; Beard v. Car Co., 72 Mo. App. 583; Devore v. Railway, 86 Mo. App. 429; Reed v. Railroad, 94 Mo. App. 371; Foster v. Railway, 115 Mo. 165; Huhn v. Railway, 92 Mo. 440. (2) The court in such case will not interfere with the province of the jury and will affirm the judgment, when the jury are properly instructed. Black v. Railway, 172 Mo. 177; Minnier v. Railroad, 167 Mo. 99; Union Mill Co. v. Bruihl, 51 Mo. 144; Moore v. Pieper, 51 Mo. 157; Covey v. Railway, 86 Mo. 635; Smith v. Railway, 119 Mo. 246; Franke v. St. Louis, 110 Mo. 516; State ex rel. v. Hope, 121 Mo. 41; Church v. Railroad, 119 Mo. 214; Lynch v.

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Railway, 112 Mo. 420; Gratiot v. Railroad, 116 Mo. 450. (3) Negligence consists in doing something which a reasonably prudent man would not have done under the circumstances, or in failing to do something which a reasonably prudent man under the circumstances would have done. McMahon v. Pacific Express Co., 132 Mo. 641. There is no absolute rule as to negligence to cover all cases.

SMITH, P. J.—Action to recover damages for personal injuries. The plaintiff in his petition amongst other things alleged, that the defendant operated machine and car shops at Moberly in said State, for the repair of its cars and all parts thereof, including cast-iron cylinders for placing under its cars for air or steam brakes used on its said cars in the operation of its road, said cylinders being about three to four feet long and weighing two hundred pounds or more. That among said shops so maintained by defendant in the operation of its road was a paint shop, foundry and car shop, situated about 300 feet apart. Between said shops was a pit about seventy feet wide and about fifteen to eighteen inches below the surface of the ground, with railroad tracks laid therein lengthwise and close to each edge of said pit. That defendant had for the purpose of conveying castings and other articles across said pit from one shop to the other a transfer table which was moved up and down said pit by means of a crank, on the track laid therein, to any point where the same was needed. The top of said table was on a level with the surface of the ground on each side of said pit between the said shops, and said articles were transferred on trucks across said table, all of which could be done with reasonable safety in such manner.

Plaintiff was in the employ of defendant working in its said shops as a laborer in the repair of cars and of car trucks for and in the operation of its road. That at the date aforesaid plaintiff, with two other

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workmen, was ordered by defendant's foreman in charge of said work and over said workmen, to carry some of the aforesaid cylinders from one of said shops to the other, across said pit and tracks laid therein, and was negligently and carelessly ordered to carry the same over on a stick, instead of using the table provided for such purpose. That in obedience to said order of said foreman, plaintiff, with his colaborers, attempted to carry one of said cylinders across said pit, by said colaborers placing a stick under the cylinder, which said cylinder was of cast iron with a very smooth surface on the outside and of a round form. Plaintiff was holding the back end of said cylinder. The cylinder was tapering from one end to the other, the large end being in front and plaintiff holding the rear or smaller end endeavoring to balance said cylinder on said stick, which by great exertion and care he succeeded in doing from one edge of the pit down, into and across said pit and tracks therein, until his said colaborers stepped across the railroad tracks at the far edge of said pit and up out of said pit to the ground level, when, by reason of the raise caused by said colaborers stepping up onto said ground level it became impossible for plaintiff to keep said cylinder on an exact balance on account of said abrupt step-up and said railroad tracks close to said bank, and the unequalled height of said colaborers holding the front end of said cylinder on said stick, and by reason of the smoothness of said stick and cylinder, it rolled, tilted and slipped on said stick and fell back onto plaintiff, greatly injuring him.

The answer contained a general denial to which was added the plea of contributory negligence and the assumption of the risk.

The evidence tended to show that the defendant's car, repair and paint shops were about 200 feet apart and fronted each other north and south and that between them there was what is called a pit in which was operated a transfer table or portable bridge over which cars

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and heavy materials were transferred from one shop to the other. The pit was about thirteen inches deep and sixty feet wide. On the morning that the plaintiff was hurt there were two cylinders in the car shop which Lang, the foreman of the two shops, wanted removed to the paint shops, and he accordingly ordered Cosby and Mitchell, two of his employees, to do this. The cylinders were truncated cones—churn shaped and about four feet long and twelve inches in diamater at the larger end and nine inches at the smaller. They weighed about 200 pounds each and were a part of the air brake system in use on defendant's railway trains. When Cosby and Mitchell came to remove the cylinders the latter suggested to the foreman that they were rather heavy for two men to carry across the pit and thereupon the foreman told them to go and get plaintiff who was at work in the car shop. Mitchell notified plaintiff to come over and help them which the latter accordingly did. The foreman directed them to use a stick or handspike in carrying the cylinders. A stick was procured which was about six feet long and 2x2 inches, one side of which was quite smooth. The cylinder had a smooth cast-iron outer surface. The stick was put under the cylinder, Cosby taking hold of one end and Mitchell the other. The plaintiff took hold of the rear and smaller end so as to keep it *in equilibrio* on the stick while being carried. The first cylinder was removed and when the men returned to get the other and had placed the stick under it, the foreman directed that it—the stick— be placed a little further forward so that more of the "heft" would be on the plaintiff in holding up the rear end. When the three men had carried it across the pit and Cosby and Mitchell had stepped upon the level ground the cylinder tilted up the smaller end descending to the sill which is the outer edge of the pit whereby the plaintiff's three fingers were caught and injured. Whether this was caused by the plaintiff slipping or stumbling or by the cylinder turning or slipping on the

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stick so that plaintiff lost control of his end of it is not clear from the evidence. The plaintiff went down with his end but just how it happened that he did so is somewhat conjectural. The plaintiff testified that Cosby and Mitchell were of *unequalled height* and that when they stepped from the bottom of the pit upon the higher ground the cylinder turned on the stick and came right down "before he knew where he was." Cosby testified that plaintiff mostly held the cylinder in balance, and that was what it was aimed for him to do; that the hind end went down before it rolled; that after that end went down it rolled over toward Mitchell. He further testified that he could not tell whether it slipped and fell or fell suddenly; that as the cylinder fell he looked behind and that the plaintiff was in a kind of stooping position and had hold of his end and jumped to let loose. The witness could not testify whether plaintiff was getting up or not, or whether he was down or not. Mitchell testified that they had stepped out of the pit before the smaller end of the cylinder fell; that when the rear end went down it rolled some toward him but the front end held on the stick. This witness in telling how the accident happened said, that he could not say "only that Paddy (plaintiff) slipped or something or stumbled on the rail pulling the cylinder down." He further testified that his back was to plaintiff and that he would not say plaintiff slipped or stumbled. Whelan, a witness for plaintiff, testified that during the time he had been in the employment of the defendant that he had helped carry two cylinders across the pit in pretty much the same way as the one was carried when plaintiff was hurt. Worledge, another car repairer who was a witness for plaintiff, testified that he had helped carry two or three cylinders across the pit in about the same way as that was carried by plaintiff and the two others, and that it had been the usage during the ten years he had worked for defendant for one, two and three men to carry cylinders and other articles across the pit from

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one shop to the other. Lang who was the foreman of the repair shops testified that he had often seen three men carry cylinders and other material across the pit, and that this was one of the ways of transferring them across the pit, and that this was a safe way of carrying them over.

The question raised by the appeal is, whether or not on the evidence as we have just stated it to be, the plaintiff was entitled to a submission of the case to the jury?

The common law enjoins upon the master the duty to furnish to the servant a reasonably safe place and reasonably safe machinery, tools and appliances in which and with which to do the master's work. Holmes v. Brandenbaugh, 172 Mo. l. c. 64; Tabler v. Railway, 93 Mo. 79; Grattis v. Railway, 153 Mo. 403. This duty, however, does not make the master an insurer of the servant. Grattis v. Railway, supra. It is not the duty of the master to furnish any particular kind of machinery, tools or appliances. His duty in this respect is to use ordinary care and diligence in selecting and furnishing such as are safe and suitable. No inference of negligence can arise from evidence which shows that the implement or appliance was such as is ordinarily used for like purposes by persons engaged in the same sort of business. Bohn v. Railway, 106 Mo. 433. Nor is the master required to furnish the servant the safest known appliances, tools or machinery, nor the latest approved patterns of the same. Holmes v. Brandenbaugh, supra. The servant when he enters service of the master assumes the risks that are usually incident to the business being conducted by the master and his wages include compensation for injuries received from such risks. A master may conduct his business in his own way and the servant knowing the hazards of his employment as the business is conducted inpliedly waives the right to compensation for injuries resulting from causes, incident thereto, though a different method of

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conducting the business would have been less dangerous. Bradley v. Railway, 138 Mo. l. c. 302. There was no evidence adduced which tended to prove that the plaintiff's injury was occasioned by the negligence of the defendant, either in furnishing the plaintiff a reasonably safe place or reasonably safe tools or appliances in which and with which to do the work required of him. There was no evidence showing that the number of men or the hand stick furnished to carry the cylinder were insufficient or unsuitable; or, if there had been no such negligence is alleged in the petition. The way which the defendant required the cylinders to be carried was one of the several ways or methods practiced and used by defendant in the romoval of cylinders and other material from one shop to another. It is perhaps true that it would have been a safer way to carry the cylinders on the transfer table than in the way they were carried, still, as the latter was a reasonably safe way the defendant was not guilty of negligence for not adopting the former. Smith v. Railway, 69 Mo. 37; Muirhead v. Railway, 19 Mo. App. 634; Conway v. Railway, 24 Mo. App. 235; Cothorn v. Packing Co., 73 S. W. 279; Bradley v. Railway, 138 Mo. 293; Minnier v. Railway, 167 Mo. 99; Holmes v. Brandenbaugh, 172 Mo. 53.

The plaintiff had been in the employment of the defendant for more than thirty years and during that time he had engaged in many kinds of work for the defendant. He had been section foreman, track repairer, car inspector, truck repairer, etc. He was a man of varied and wide experience and perfectly familiar with the defendant's manner and way of carrying on its business at its shops where he was injured. At the time of such injury he was employed as a truck repairer and to do such jobs as he was ordered by the foreman. He knew the risks and hazards that were ordinarily incident to the defendant's business as conducted by it, and no reason is seen why he should not be held to have assumed such hazards and risks and to have impliedly

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waived his rights to compensation for the injuries that he might receive from the same. If this rule has no application to this case then it is difficult to conceive of one to which it does apply.

Turning again to the consideration of the evidence it will be seen that it does not very clearly show how the injury happened. It appears that as Cosby and Mitchell, who had hold of the stick, were carefully walking along and had stepped from the bottom of the pit to the ground above, that the hind end of the cylinder went down. The weight of the cylinder was quite equally balanced on the stick, leaving little or no weight to be carried by the plaintiff. He was only required to keep it *in equilibrio*. If the front end was carried to a greater elevation by the stepping of Cosby and Mitchell out of the pit upon the surface of the ground above it would have been an easy matter for plaintiff who was still in the pit to have correspondingly elevated the hind end and thus have maintained the balance; but this, it appears, he neglected to do and the consequence was that the "heft" of the cylinder was shifted from the stick to the hind end, and this, no doubt, was the cause of that end descending to the sill and catching his fingers.

It is impossible to see how the hind end of the cylinder could have gone down while in the hands of the plaintiff, as it undoubtedly did, unless the plaintiff had neglected the duty he was required to perform in respect to keeping its balance on the stick. If he had been on the alert and had given proper attention to the work in hand we can not see how the hind end would have "suddenly gone down," even if the upper face of the stick on which the cylinder was balanced was somewhat smooth. If the hind end had been depressed or elevated as the cylinder was carried along accordingly as was necessary to keep it balanced on the stick the accident would have been averted. The cylinder could not, under such conditions, have slipped or tilted so as to

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throw the "heft" on the plaintiff. Such accident was caused not from the unsuitableness or unfitness of the stick for the use to which it was put nor from that of the kind of men used in carrying the cylinder, nor from the unsafety of the way it was ordered to be carried, but, rather, from the negligence of the plaintiff himself. If the cause of the plaintiff's injury can, as we think is the case, be imputed to the fault of anyone, it must be to that of the plaintiff himself, and for such the law gives him no redress. It may be that the plaintiff was not guilty of any negligence or carelessness in handling the cylinder, and that a misstep, slip or stumble of the foot or something of the kind caused him to cast his weight on the hind end of the cylinder and in that way he was disabled from keeping it in balance on the stick, in consequence of which the fore end tilted up and the hind end down, thereby causing the injury. If the injury did not result from the fault or negligence of the plaintiff but from an unforeseen casualty, as we think may fairly be inferred from all the evidence, the result would be the same: that is to say, there would be no liability in either case.

In view of the entire evidence we think we are justified in concluding that on either or all of the grounds stated by us the plaintiff's case must fail and that the court erred in denying defendant's demurrer. Accordingly the judgment will be reversed. All concur.

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JAMES CHOWNING, Respondent, v. C. A. PARKER et al., Appellants.

Kansas City Court of Appeals, February 1, 1904.

1. **TRIAL AND APPELLATE PRACTICE: Misconduct of Attorney: Setting Aside Verdict.** In his argument to the jury plaintiff's counsel referred to certain refused evidence as well as to former verdicts in the cause, and when objection was raised said he did it through inadvertence. *Held*, no excuse, and the remedy is to set aside the verdict.

2. **———: Evidence of Absent Witness: Loss of Affidavit.** Defendant filed an affidavit for continuance setting forth the evidence of an absent witness. Thereupon the trial proceeded upon the theory that the defendants would read the matter set out in the affidavit as evidence. When they desired to do so the affidavit was lost, but the defendant proceeded with the trial. *Held*, defendant should have asked leave to supply the lost affidavit, and failing to do that has no cause to complain.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins*, Judge.

REVERSED AND REMANDED.

James J. Nelson for appellants.

(1) "When counsel, in argument to a jury, attempt to make a case which they would not be allowed to establish by evidence, their conduct, if objected to at the time and allowed to pass unrebuked, is ground for a new trial." Norton v. Railway, 40 Mo. App. 642; McDonald v. Cash, 45 Mo. App. 66; Gibson v. Viebig, 24 Mo. App. 66; State v. Lee, 66 Mo. 165; Evans v. Trenton, 112 Mo. 390. "When it is probable that remarks of counsel affected the result it is the plain duty of the court to grant a new trial." Evans v. Trenton, 112 Mo. 390; Enser v. Smith, 57 Mo. App. 584. (2)

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The declaration made by plaintiff's attorney to the jury that the case had been a couple of times previously decided adversely to defendants, is good ground for a new trial. State v. Leabo, 89 Mo. 247. (3) Attorney A. M. Whitworth's attempt to stifle evidence and to gain an unconscionable advantage should be defeated by setting aside the verdict. Rickroad v. Marton, 43 Mo. App. 599.

A. M. Whitworth for respondent.

(1) The alleged improper remarks of counsel for respondent while addressing the jury were made in his opening address and inadvertently and were considered harmless by the court and do not furnish any ground for reversal, as this is a matter largely within the discretion of the trial judge. Huckshold v. Railroad, 90 Mo. 548; Sikekum v. Railroad, 93 Mo. 40. In such cases the trial court is almost the final arbiter, and unless he clearly abuses his discretion the appellate court will not interfere. Lydia M. Lloyd v. Railroad, 53 Mo. 509; State v. Morgan, 1 Mo. App. 22; Wright and Orrison v. E. D. Brown, 68 Mo. App. 577; Hoffman v. Hoffman, 126 Mo. 487; Burdoin v. Town of Trenton, 116 Mo. 359.

BROADDUS, J.—This suit originated in a justice's court and was appealed to the circuit court where it was twice tried, each of the several verdicts being for the plaintiff. As the statement on which the case was tried was lost and has not been supplied, we can only infer from other documents and the contention of the parties the cause of action at issue.

It seems that in April, 1901, plaintiff sold to defendants a mining plant—a concentrating mill; that plaintiff was to receive therefor of the defendants when delivered the sum of $3,500; that said plant was already constructed, but was to be moved by plaintiff to defendants' mine, reconstructed and put in as good condition

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as it was before its removal. The greater part of the purchase price had been paid and plaintiff's claim was for $165, which was alleged to be still due him. Defendants filed a counterclaim in which they admit that the original consideration for the plant was $3,500, but allege that the consideration was subsequently reduced by the parties to $3,415, or $85 less; and they further allege that they were damaged in the sum of $250 by reason of the defective reconstruction of said plant. There was evidence pro and con on the issues presented by the pleadings. Instructions were given at the instance of the parties, respectively, and some by the court on its own motion, but no complaint is made in defendants' motion for a new trial in that respect.

On the trial plaintiff offered in evidence a paper showing the amount of lead and jack turned in from the mine operated by the plant in controversy after it had been reconstructed. Defendants objected to it as irrelevant. The court admitted it as evidence on the ground that it would show the capacity of the plant. We think the court was right; it was a circumstance tending to show the capacity of the plant after its removal and reconstruction which related to the matter in issue.

The plaintiff tendered evidence to show that defendants offered him $85.14 as a compromise, but upon objection the tender was refused. The plaintiff's attorney in addressing the jury referred to that fact and, also, to the fact that the two former verdicts in the case had been in favor of plaintiff. The defendants objected to the conduct of plaintiff's attorney for so doing in both instances but his objections were overruled. The plaintiff's attorney seeks to palliate his conduct by saying that it was inadvertent. This is no excuse. If lawyers will persist in this kind of practice, which the courts have always condemned but sometimes excused, the time has arrived when something should be done to prevent it for the future. The remedy is to set the verdict aside. The trial judges are much annoyed by the

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practice of attorneys indulging in such conduct in order to get an advantage of their adversary. The plea of inadvertence and want of motive ought not to be received, either as an excuse or as a palliation of the offense. After instilling the poison into the mind of a juryman, for that is the object, as a rule, the wrong is not undone by the empty apology that the act was unintentional. Every lawyer ought to know that such conduct is wrong and unbecoming an honorable profession.

The defendants when the trial was called were not ready on account of the absence of a material witness. Affidavit was made as to what his evidence would be if he was present. They went into the trial with the understanding that they could read this affidavit to the jury; but it was not to be found when the time arrived for its introduction and the defendants concluded their side of the case without it. It is admitted that this affidavit was handed to plaintiff's attorney. It transpired that it had been carried from the courtroom by an attorney who had nothing to do with the case. It was found in a bundle of papers secured together by a rubber band. The attorney who carried it away did not know that he had done so. It further appears that plaintiff's attorney stated that he had laid it on the judge's desk. The defendants claim that plaintiff's attorney hid it in said bunch of papers for the purpose of keeping it from being read in evidence. They insist that they were greatly injured by the wrongful conduct of said attorney in suppressing the evidence contained in said affidavit.

When defendants discovered the loss of the affidavit they should have asked the court at least for the privilege of supplying such loss, which no doubt the court would have permitted. C. A. Parker, one of the defendants, made the affidavit at the beginning of the trial, and was in a position to have supplied the missing one, but defendants submitted their case without making any kind of effort to supply such evidence. For which reason they have no cause for complaint.

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Other immaterial points raised by defendants will not be noticed. But on account of the misconduct of plaintiff's attorney herein condemned, the cause is reversed and remanded. All concur.

JULIA ANN WOODY, Respondent, v. ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY et al., Appellants.

Kansas City Court of Appeals, February 1, 1904.

1. **APPELLATE AND TRIAL PRACTICE: Irregular Proceedings: Objections: Exceptions.** Though a proceeding be irregular and out of established precedence, yet, if neither party interposed an objection nor save an exception the appellate court can not review the proceedings.

2. ———: ———: **Fair Trial.** When an issue is raised, fairly submitted and passed upon by the jury the result can not be disturbed when there is conflicting evidence and the trial court can not ignore the facts found by the jury but should act on them.

3. ———: ———: **Reversal of Judgment.** The appellate court is not at liberty to reverse a judgment though irregular and erroneous unless the error committed against the appellant materially affects the merits.

Appeal from Polk Circuit Court.—*Hon. Argus Cox*, Judge.

AFFIRMED.

J. F. Parker and *J. T. Woodruff* for appellants.

(1) Defendants' interpretation of the release, and their understanding of the agreement was known to the plaintiff and her attorneys immediately after the settle-

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ment, notwithstanding, she never returned or offered to return the $510 paid as a consideration of the compromise, or even as much as tendered a return in her replication, although she does admit therein that she made a settlement of the case. Such being the condition of the case, it was the duty of the court to sustain defendants' motion for judgment upon the pleadings, for plaintiff could not retain the benefits accruing to her by the terms of the compromise, and at the same time, escape its provisions in other respects. Och v. Railroad, 130 Mo. 27; Este v. Reynolds, 75 Mo. 563; Jarrett v. Morton, 44 Mo. 275; Hart v. Hamilton, 43 Mo. 171; Carson v. Smith, 133 Mo. 606; Doane v. Lockwood, 115 Ill. 490; s. c., 4 N. E. 500; Pomeroy, Eq. Jur., 910; Railroad v. Hays, 83 Ga. 558; Ins. Co. v. Howard, 111 Ind. 544; s. c., 13 N. E. 103; Gould v. Bank, 86 N. Y. 75; Cobb v. Hatfield, 46 N. Y. 533; Bispham's Eq. (3 Ed.), s. p. 472. (2) As to the second assignment, that the court erred in narrowing down the issue as to whether the case should be dismissed at the cost of the plaintiff or defendants, and excluding all other issues and compelling the defendants over their objection and protest to go to trial upon that issue, it seems there can be but one answer, which is that the court not only committed error, but error of a kind unheard of under the practice in this State. (3) Where permission is given to prosecute a suit as a poor person, costs can be recovered only as an incident to a judgment. No judgment having been entered for the plaintiff, costs could not be recovered against the defendants. R. S. 1899, sec. 1545; Thompson v. Elevator Co., 77 Mo. 520; Murphy v. Smith, 86 Mo. 333; Hoover v. Railroad, 115 Mo. 77.

Rechow & Pufahl for respondent.

Submitted an argument.

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SMITH, P. J.—This is an action which was brought in the Polk county circuit court by the plaintiffs George and Julia Ann Woody, husband and wife, against the defendant to recover $5,000 damages for the death of their infant son, Troy, which it was alleged in the petition was occasioned by the negligence of the agents and servants of said railway company while engaged in operating one of its trains of cars, etc. Upon the application of defendant the venue of the cause was removed to the circuit court of Dallas county; and upon their further application it was removed from the latter court to the circuit court of Cedar county, just after which the plaintiff, George Woody, died. While the cause was pending in the last named court some compromise settlement of the cause was entered into between the surviving plaintiff and defendants. The later produced before the court a writing which plaintiff had signed by making her mark and which paper recited that for the consideration of $500 she released the defendants from all manner of actions whatever which she had against them, etc. Defendants further produced another paper similarly signed which authorized the attorneys of the defendants to dismiss the plaintiff's action at her cost. The defendants' attorneys accordingly moved the court to dismiss the action at her costs; but to this she objected on the ground that she had not executed the paper produced by defendants authorizing such dismissal. The court refused to sustain the defendants' motion, and thereupon by consent of parties the venue of the cause was changed back to the circuit court at Polk county.

After three changes of venue and two jury trials without decisive results the defendants filed an amended answer in which, amongst other defenses, was pleaded the release heretofore referred to. The plaintiff filed a replication in which it was alleged that she made a settlement of the cause of action alleged in her

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petition and by the terms of which "defendants agreed in consideration of the release of said cause of action to pay her $510 and also to pay all the costs that had accrued in the action; that the defendants' agents prepared said release papers for her to sign which she understood contained the agreement just stated instead of that pleaded by the defendants in their answer, to which she never assented, made nor entered into; that she was illiterate, could neither read nor write, and made her mark only, and that she did so with the distinct understanding that it embraced the contract as agreed upon in all the conversations and upon all the representations in relation to the matter of such settlement," etc.

At this stage of the case the defendants filed a motion to set aside the order theretofore made permitting plaintiff to prosecute her suit *in forma pauperis* and to require her to give bond for costs, etc. And thereupon the court made an order sustaining the said motion with the qualification that, "the only issue which the court will permit plaintiff to try without giving bond is the issue as to which party should pay the costs already accrued." No exception was taken by either party to this ruling of the court. The plaintiff then filed a motion to dismiss the action at the cost of the defendants, alleging as the ground therefor that she was illiterate, being unable to read or write, and that defendants' agents stated to her that they would pay her $500 and all costs of suit if she would settle her claim; that she was then in destitute circumstances and was not represented by her attorneys; that defendants procured the services of her mother and brothers to aid them in inducing her to settle said claim, and that by reason of said undue influence she was induced to make the said pretended compromise settlement; that the written contract produced by defendants by which she appeared to have agreed that her action be dismissed at her cost

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was never agreed to or signed by her and that such agreement was not her agreement.

The court thereupon required the parties to proceed to trial upon the issue raised by the motion.

There was a trial to a jury, where the evidence adduced tended to prove that the defendants' claim agents came to plaintiff's house about a month after the death of her husband and endeavored to induce her to compromise her claim for the death of her son; that they offered to pay her $510—the $10 to buy something "to go on;" that they prepared the paper which she could not read and which they pretended to read to her, and as read to her it provided that she was to receive $500 and the defendants were to pay the costs of the action she had then pending against them, and so understanding it she signed it by making her mark. The evidence was in many respects conflicting but that for plaintiff tended to support the allegations of her motion.

At the conclusion of all the evidence the defendants requested an instruction in the nature of a demurrer to the evidence which was by the court refused. The court thereupon instructed the jury in effect (1) that the question submitted to it was, "Did the defendant by its agent agree, at the time the compromise was effected, to pay the costs of the action, and (2), that if it believed from the evidence that the stipulations to dismiss the suit offered in evidence was read over to plaintiff and she understood its contents at the time she signed it or made her mark then that writing became the contract between the parties and its answer to the question herewith submitted should be "no." If, however, it believed that the stipulations aforesaid was read to her by defendant's agent, expressing the agreement that defendant should pay the costs, and she did not know at the time of signing this stipulation what its provisions were, then she is not bound by it.

The verdict of the jury was: "Did the defendant by its agents agree at the time the compromise was

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effected that the costs of the suit should be paid by defendant? Yes." Judgment was thereupon given to the effect that the costs of the suit not theretofore taxed to either party for special cause be taxed against defendant in accordance with the verdict, and that the motion to dismiss the cause be sustained and that execution issue for such costs. The defendant after an unsuccessful motion to set aside the verdict and judgment, appealed.

It must be conceded that the ruling of the court on the defendant's motion to set aside the order allowing plaintiff to prosecute her action as a poor person and to require her to give a bond with security for cost, was unusual, irregular and perhaps outside of the established precedents; yet, as neither party interposed any objection thereto, or, if so, made such objection the basis of an exception but rather acquiesced therein, such ruling is not now before us for review.

And, too, it may be conceded that it was irregular to allow the issue raised by the answer and replication as to whether or not the plaintiff had been induced to agree to and sign the compromise stipulations by misrepresentation and undue influence, or whether or not she had as a part of such compromise agreed that the action should be dismissed at her cost, to be raised by the motion of the plaintiff; yet, as such issue was so raised, fairly submitted and passed upon by the jury, we do not think the result ought to be disturbed, and especially so since it is clear that the evidence introduced on the motion *pro et con* fully justified the verdict of the jury that it was a part of the compromise agreement that defendant should pay the cost. The facts alleged in the motion being thus indubitably established, though, perhaps, in a way somewhat irregular, the court could not ignore their existence and in spite of them refuse to dismiss the action at the cost of defendant.

The judgment dismissing the action, in view of the

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evidence, was therefore manifestly right, and though the proceedings leading up to it were perhaps irregular and erroneous, yet, we do not feel at liberty to disturb it because we are expressly commanded by the statute not to reverse the judgment of any court unless we believe that error was committed by such court against the appellant or plaintiff in error and materially affecting the merits. Section 865, Revised Statutes.

It would have been far more regular and in conformity to the practice established by our code of civil procedure—section 654, Revised Statutes—to have sustained or overruled the defendant's motion without qualification and to have submitted the issue along with other issues raised by the pleadings at a trial thereafter to be had. But if the issue had been regularly submitted it is difficult to see how a different result could have been reached, and therefore we can not see how the defendant has been prejudiced.

Many questions have been discussed in the brief of the defendant, but in the view which we feel obliged to take of the case it would serve no useful purpose to notice them. Our conviction is that though the proceeding complained of was in many respects irregular, and perhaps erroneous, yet, as a correct result was thereby reached, we feel constrained to give it our sanction and to affirm the judgment. All concur.

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THE STATE OF MISSOURI ex rel. JAMES F. BROWN, Relator, v. C. P. STIFF, Mayor, et al., Respondents.

Kansas City Court of Appeals, February 1, 1904.

1. **MUNICIPAL CORPORATIONS: Dramshop Ordinance: Petition: County License.** An ordinance relating to the granting of dramshop licenses in a municipality, set out in the opinion, does not make it compulsory on the council of such municipality to grant a city license to an applicant who has qualified himself under the ordinance and obtained a license from the county court.

2. **———: Dramshop License: Qualified Applicant: Council's Discretion: Mandamus.** Whether a dramshop license shall be granted is a matter within the discretion of the city council, even though the applicant be qualified in every way; and such discretion can not be controlled by mandamus. (Cases considered.)

Original Proceeding in Mandamus.

WRIT DENIED.

J. H. Chinn, Guy B. Park and *Wilson & Wilson* for relator.

(1) All requirements of the ordinances of the said city of Edgerton having been complied with by relator, mandamus will lie to compel the issuance of the license. State ex rel. Baker, 32 Mo. App. 98; State ex rel. Ruark, 34 Mo. App. 325; State ex rel. Chase, 42 Mo. App. 352; State ex rel. Cook, 174 Mo. 120, 121; St. Louis v. Weitzel, 130 Mo. 602, 620; St. Louis v. Mfg. Co., 139 Mo. 560; Henry v. Burton, 107 Cal. 535; Brock v. State, 65 Ga. 437; Zanone v. Mound City, 103 Ill. 552; Mayor of Rome v. Duke, 19 Ga. 93; Ex Parte Reynolds,

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87 Ala. 138. (2) Mandamus will not lie to control the judgment or discretion of an inferior court, for this in effect, would be to substitute the opinion of the superior for that of the inferior court. High on Ex. Leg. Rem., secs. 171, 176, 156; State ex rel. v. Megown, 89 Mo. l. c. 157; State ex rel. v. Tracy, 94 Mo. 217, 220; Beck v. Jackson, 43 Mo. 117; State ex rel. v. Marshall, 82 Mo. 484; Williams v. Cooper Court Common Pleas, 27 Mo. 225; State ex rel. v. Lubke, 85 Mo. 338. (3) Certainly in view of this unanimity of authorities and of the admission of respondents that "on the 19th day of October, 1903, the county court issued to relator on his application and a petition therefor, a license regular on its face, to keep a dramshop on lot 7 in block 4, Edgerton, Missouri," and of the admission of the judgment of the county court thereon in respondents' return, respondents will not be permitted, in this proceeding, to question the jurisdiction or judgment of the county court.

Sidney Beery, E. C. Hall, Culver, Phillip & Spencer for respondents.

(1) Mandamus will not lie to control the discretion of a tribunal acting in a judicial capacity or direct it to render a particular judgment. State v. Fladd, 108 Mo. 614; Dunklin Co. v. County Court, 23 Mo. 449; State ex rel. v. McGowan, 89 Mo. 156; State ex rel. v. Field, 37 Mo. App. 83; State v. Oliver, 116 Mo. 188; State v. Board of Health, 103 Mo. 22. (2) The granting of a dramshop license by a county court rests in the discretion of the county court and its action can not be controlled by mandamus. State ex rel. v. Hudson, 13 Mo. App. 61; State ex rel. v. Meyers, 80 Mo. 601; Dean v. Burton County Court, 33 Mo. App. 635. (3) And so it has been squarely held in this State that the proceeding of a board of alderman of a city of the fourth class (such as Edgerton is) in passing on an ap-

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plication for a dramshop license is judicial. (4) Under the statute it was not lawful for respondents to issue a city license or the county court to issue a county license until a petition signed by the requisite number of tax-paying citizens should "be filed in the office of the clerk of the county court not less than ten (10) days before the first day of the court to which it is to be presented and to remain on file for public inspection and by said clerk laid before the court at the next term thereafter."

ELLISON, J.—The relator is an applicant for a license to keep a dramshop in the town of Edgerton. The respondents are the mayor and aldermen of that town. Relator obtained an alternative writ of mandamus, and respondents have now made return. The facts are agreed upon.

The town of Edgerton is of the fourth class and contains less than two thousand inhabitants. Among the ordinances of the town is the following relating to dramshop license:

"Section 81. Any person who shall directly, or indirectly sell any intoxicating, fermented or distilled liquor in less quantity than three gallons, either in the original package or otherwise, within the corporate limits of this city, without first having obtained a license as dramshop keeper, according to the provisions of the laws of this State, and of these ordinances, shall be deemed guilty of a misdemeanor.

"Section 82. A dramshop license shall not be granted to any person who shall have been convicted of a violation of the ordinances of this city, relating to the sales of intoxicating liquors, nor to any drunkard; and no license shall in any case be granted to any person, who shall not have previously presented a proper petition to the county court of this county, and obtained a license from such court, to keep and maintain a dramshop in this city.

"Section 83. Every person who shall desire to

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keep a dramshop in this city, shall file an application with the board of aldermen, stating the name of the party so desiring the license and the ward and street, together with the lot and block, where such dramshop is desired, and that the applicant has obtained a proper license therefor from the county court of this county. No license for a dramshop shall be for a period of less than six months, to correspond with the date and expiration of the license obtained from the county court. The board shall in no case refund any portion of the license tax collected for such license, nor shall any such license be transferable.

"Section 84. Every person to whom a dramshop license may be granted by the board of aldermen, shall pay a license tax of $300 for every period of six months, to be paid in advance before a license shall be delivered. And no such license shall authorize the keeping of more than one dramshop at the same time under such license."

The relator presented a petition to the county court of Platte county and obtained from that court a license for six months. He thereupon made application for a town license to the town council, composed of those respondents, which was refused. He possessed all the qualifications required by the statute and the ordinances aforesaid in order to be a dramshop keeper. He tendered the amount of the license tax and his bond. For the purposes of this case it may be said that he possessed all the necessary qualifications for a dramshop keeper, and that he did everything which it is required shall be done as a prerequisite to obtaining a license from the town council, unless it be that he should have presented a petition to the council, for that he did not do.

The theory of the relator is that by the ordinance above quoted, when he possessed the qualifications which are therein set out and when he had obtained a license from the county court, he had a right to *demand* a license from the city council. We reject that theory on the double ground that the ordinance should not be

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construed as he construes it; and that if it should properly bear that construction, it would be void.

The town and the county are independent entities governed by independent bodies or tribunals, especially as to saloon licenses. No one can legally sell liquors within the limits of the town until he has a license from both town and county. The council, in recognition of this fact, ordained that it would not grant a license to anyone who had not obtained a license from the county court; but it did not ordain that it would grant a license to anyone who did get one from the county court. By this ordinance, the town council prescribes proper and reasonable qualifications for a dramshop keeper, but it by no means said that all who had such qualifications would be granted a license. The language of the ordinance (section 83) aforesaid, that, "Every person who shall desire to keep a dramshop in the city, shall file an application," etc., stating, " . . . that the applicant has obtained a proper license therefor from the county court," is no more authority for the position that if one makes such application he thereby, of right, becomes entitled to the license, than is the language of the general statute (section 2997) that upon the doing of certain things there required, the applicant could compel the issuance of a license. Neither the statute nor the ordinance intended to vest a right, but each merely intended to fix a qualification for those to whom a privilege could be granted.

As just said, the council is powerless to enact an ordinance of the character relator says this one is. The granting a saloon license in cases like this is a matter of discretion. And the council can not by a present ordinance grant away its future discretion. It is as powerless as is a Legislature to enact a law that at some future time it will not enact some other law.

The city council to perform its duty as contemplated by law must exercise its discretion on each application

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as it is made, unbound by any notion of absolute or contractual right in the applicant, and uncontrolled by any prior action of the county court. The county court is one degree farther removed from the people of a town than the council. There are other considerations to be thought of in passing upon a dramshop license than the mere statutory qualification (state or municipal) of the applicant. It may be apparent to the council that too many are engaging in the business for the well being of the town; and it may be manifest that the place where it is sought to be located is not for the best. These, and other suggestions which might be made, demonstrate that the council has no right or power to surrender its discretion in advance, or to delegate its functions to the county court. The wisdom of this is illustrated in this case. For it is one of the admitted facts that the petition presented to the county court and upon which the county license was issued did not contain (according to the city tax books) the names of a majority of the taxpaying citizens of the town as is required by section 2997 of the statute.

We have been cited to some cases from other States which would sustain relator's position, if we construed the ordinance as he does. But those cases are not at all in harmony with the policy of this State, as has been announced from as far back as 1847. Austin v. State, 10 Mo. 591. In that case, and many others since, it is decided that the business of selling liquor is not a right and can not be likened to the ordinary callings of life; that it is a mere privilege to be granted or withheld at the exclusive discretion of the body empowered to license. State ex rel. v. County Court, 39 Mo. 521; State v. Searcy, 20 Mo. 489; State ex rel. v. Hudson, 78 Mo. 302; State v. Evans, 83 Mo. 322; State v. Bixman, 162 Mo. 21, 22.

As to the case from this State cited by relator (State ex rel. v. Baker, 32 Mo. App. 98) we need not pronounce the view there stated as sound or otherwise,

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for it is certain that it has no application here. There, the council exercised its discretion by determining that the applicant should have the license; but at that stage, refused to issue it unless he paid a tax double that required when he presented his application and a motion made that it be granted. The court considered the case as, and likened it to, an attempt to raise the license tax on a license not yet expired, which can not be done. City of Hannibal v. Guyott, 18 Mo. 515.

We have thus shown that the granting a license by a town council is discretionary. It follows that mandamus can not be invoked to control that discretion. State ex rel. v. Hudson, 13 Mo. App. 61; State ex rel. v. Higgins, 84 Mo. App. 531, and other authorities in respondents' brief. Indeed, it is a fundamental rule of law, that whenever courts or other tribunals are in duty bound to exercise their own judgment, no superior court will attempt to exercise it for them.

The foregoing views renders it unnecessary to notice other points made by the respective counsel.

A peremptory writ is denied. The other judges concur.

J. E. BROWN, Respondent, v. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, February 1, 1904.

1. **RAILROADS: Killing Stock: Evidence.** A plaintiff in an action against a railroad for killing stock is not compelled to establish his case by direct proof, but may do so by such circumstances as will justify the necessary inferences.

2. ———: ———: **Trespassing: Consent of Landowner.** Where the plaintiff's horse, for killing which he sues, was pastured upon the land of the adjoining proprietor with his consent, the railroad company owes him the duty to keep a lawful fence and will be liable for injuries to his horse by failure so to do.

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3. ———: ———: **Instructions: Pleading.** A reference in an instruction to the pleadings where the facts necessary to be found are fully told in other instructions, will not warrant a reversal.

4. ———: ———: **Attorney's Fee: Constitution.** Section 1107, Revised Statutes 1899, authorizing the taxation of an attorney's fee in cases where the plaintiff recovers against a railroad for killing stock, has been decided unconstitutional by the Supreme Court in Paddock v. Missouri Pacific Railway Company, 155 Mo. 520.

Appeal from Randolph Circuit Court.—*Hon. John A. Hockaday*, Judge.

AFFIRMED, *si.*

Geo. P. B. Jackson for appellant.

(1) There was no proof that the horse in question was frightened by an engine and by reason of such fright ran into the fence and was killed. Briggs v. Railroad, 111 Mo. 168-175; Perkins v. Railroad, 103 Mo. 52; Yeager v. Railroad, 61 Mo. App. 594. (2) All the evidence shows that the plaintiff's horse passed onto the railroad from the pasture of one Lusk, and there was no proof that the horse was in the pasture by Lusk's permission. Geiser v. Railroad, 61 Mo. App. 459, 463; Ferris v. Railroad, 30 Mo. App. 122, 124. (3) The trial court committed error when by its instructions it referred the jury to the pleadings to ascertain what the issues were. Dassler v. Wisley, 32 Mo. 498-501; Grant v. Railroad, 25 Mo. App. 227-232; Remmler v. Shenuit, 15 Mo. App. 192-196; Butcher v. Death, 15 Mo. 272-274; McGinnis v. Railroad, 21 Mo. App. 399-413; Coal Co. v. Railroad, 35 Mo. 84; Proctor v. Loomis, 35 Mo. App. 482-488. (4) The court erred in assuming to make an assessment of attorney's fee, either with or without a jury, on the 20th of September, after having received a verdict and entered final judgment in the case on the 19th of September, and especially after having

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refused by the amendment of the plaintiff's instruction to allow the original jury in the case to make an assessment of a reasonable attorney's fee. R. S. 1889, secs. 2206 and 2213; Sater v. Hunt, 61 Mo. App. 228; Marble Co. v. Bauman, 55 Mo. App. 204, 211; McCord v. McCord, 77 Mo. 166, 175; Lumber Co. v. Hoos, 67 Mo. App. 264, 276; Cox v. Bright, 65 Mo. App. 417, 422; Beshears v. Banking Assn., 73 Mo. App. 293, 298; Mooney v. Kennett, 19 Mo. 551; Nuckolls v. Irwin, 2 Neb. 60; Freeman on Judgment, sec. 104a.

Wight & Woods for respondent.

(1) There was ample evidence to support the verdict and the court properly overruled the demurrer asked by defendant at the close of all the evidence. Haferty v. Railroad, 82 Mo. 90; Blewett v. Railroad, 72 Mo. 583; Keltenbaugh v. Railway, 34 Mo. App. 147; Combs v. Railroad, 58 Mo. App. 467; Dilly v. Railroad, 55 Mo. App. 123; Harbeston v. Railroad, 65 Mo. App. 160; Blewitt v. Railroad, 72 Mo. 583; Taylor v. Penquite, 35 Mo. App. 403; Gaines v. Fender, 82 Mo. 509. (2) Appellant's contention that there was no proof that the horse was in the pasture of one Lusk with his permission is without merit as the uncontradicted testimony of several witnesses was that the stock of Murphy and Lusk passed back and forth from one pasture to the other by mutual consent and Murphy's own testimony is that plaintiff's horse was in his pasture with his knowledge and consent. (3) There is no merit in appellant's contention that the attorney's fee was illegally taxed.

BROADDUS, J.—On December 3, 1900, this cause was affirmed in this court. On the 12th day of said month a motion for rehearing was filed on the ground that the decision was in conflict with a controlling decision of the Supreme Court, to-wit: Paddock v. Railway, 155 Mo. 524, wherein it was held that section 2613, Re-

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vised Statutes 1889 (section 1107, Revised Statutes 1899), that provided for an attorney's fee in case the owner of live stock should be compelled to sue for damages to such stock injured or killed, occasioned by reason of the failure of a railroad company to fence its tracks, as provided by law, was unconstitutional. On the 17th day of December, 1900, said motion was sustained and the cause certified to the Supreme Court. At the April term of said Supreme Court an opinion was handed down wherein the court held that it did not have the jurisdiction of the cause; that notwithstanding the section in question was unconstitutional, it could not avail the defendant as it was not "timely and properly invoked in the trial court," and ordered the cause remanded to this court.

This is an action for damages brought under the provisions of section 2612, Revised Statutes 1889, to recover the value of plaintiff's horse which escaped onto defendant's right of way at a place where there was not a lawful fence, was frightened by a passing train and run into a barbed wire fence and was killed. In a trial below, plaintiff recovered $25 for the loss of his horse and $25 attorneys' fee, and defendant appealed.

"1. A great part of defendant's brief and argument is taken up with the contention that the evidence failed to make a case for plaintiff and that the court should have given a peremptory instruction for defendant. It seems that plaintiff was stopping or boarding with a farmer by the name of Murphy whose pasture adjoined the defendant's right of way on the north. With Murphy's consent plaintiff had his horse in this pasture. Immediately on the west of Murphy's land one Lusk had a pasture; but between these there was no division fence, and the stock, by common consent, was allowed to pass from one pasture to the other. Plaintiff was in the habit of feeding his horse morning and evening, but on the morning of October 15th, the horse was missing and plaintiff found the animal dead

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on the defendant's right of way. After an investigation it was discovered that the horse had run into a barbed wire fence which so cut and lacerated his throat that he died from loss of blood. The testimony of plaintiff and some of his witnesses tended to show that the horse got upon the track where Lusk's pasture joined the right of way and where the fence was defective, went from there along the track on a run until he got upon a dump or fill and then jumped or slided down and onto the fence where he was fatally injured. From there, the evidence showed the animal walked down the right of way a short distance where he was found dead. The evidence of both parties coincides as to where the horse was injured but disagrees as to where he got upon the right of way—that of the defendant tending to prove that the horse was scared into or driven upon the fence where he was injured, from the pasture side, while that of the plaintiff tended to prove that the animal got upon the railroad at another point and was frightened and caused to run into the wire fence further east. It is true that there was no direct evidence that the horse was frightened by a passing engine and thereby caused to run into the wire fence, neither did any witness testify that he saw or heard any train pass on the night when the animal was killed. The facts and circumstances detailed in evidence however tend to establish that such was the fact. It was shown that trains were due to pass during that night, and the jury might reasonably infer that one or more trains did pass. Plaintiff's witnesses also testified to having seen the horse's tracks along the right of way from the place where he got over the defective fence, indicating that he jumped and ran down the railroad track until he got upon a high fill or embankment, and that from there he jumped or slided down the side thereof and into the wire fence where he was badly cut and killed. These are circumstances from which the jury might reasonably infer that the animal got upon the track and

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was frightened into the fence by a passing locomotive. The plaintiff was not compelled to establish this by direct proof; it was sufficient to prove such circumstances as justified the inference. See authorities cited in plaintiff's brief.

"The contention that because plaintiff's horse got upon the defendant's right of way from Lusk's pasture he could not recover, is based on a misapprehension of the testimony. While it is true that plaintiff's horse was being pastured by Murphy, yet, as already stated, the latter's pasture and that of his neighbor Lusk were adjoining and there was no partition fence between them; it had been removed for the time being, preparatory to opening a public road; and by mutual consent of these adjoining proprietors the stock was allowed to pass back and forth from one pasture to the other. This is shown by the uncontradicted evidence in the case. The plaintiff's horse was not then trespassing on the premises of Lusk, but was there by the latter's consent. Under all the cases then, the defendant owed the plaintiff the duty of maintaining a lawful fence at the point in question. It was sufficient to prove that the horse was on the premises by and with the consent of Lusk, the owner. Geiser v. Railway, 61 Mo. App. 459-63, and cases cited.

"II. The instructions have been examined and found to intelligently cover every branch of the case. The criticism that they refer the jury to the pleadings to ascertain the issues is unmerited. The only reference to the pleadings is found in plaintiff's first instruction and there it was entirely harmless. The reference was there made for the mere purpose of shortening a description and could not possibly do the defendant any harm—especially as the other instructions fully and completely told the jury what were the facts necessary to be found. Edelmann v. Transfer Co., 3 Mo. App. 503-06.

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When the jury returned a verdict for the plaintiff for his damages, the court taxed against defendant a fee of $25 as provided by section 2613, Revised Statutes, 1889—now section 1107. At the March term, 1899, the Supreme Court in Paddock v. Railway, reported in 155 Mo. 520, declared that said provision for taxing an attorney's fee was unconstitutional and void. The decision refers to section 2612, but that is a clerical mistake as that section only gives a right of action for damages to the owner of stock killed or injured by reason of the failure of railroad companies to maintain lawful fences inclosing their railroad tracks.

Notwithstanding the Supreme Court returned the case to this court for the reason given, we are of the opinion that it is our duty—the section of the statute under which an attorney's fee was taxed against defendant being invalid—to relieve defendant of that part of said judgment. The section having been declared invalid it is to be regarded in law as if it had never existed. It was therefore error in the trial court in taxing an attorney's fee against defendant.

If the plaintiff will enter a remittitur of $25 taxed as attorneys' fee within twenty days, the cause will be affirmed; otherwise, it will stand reversed and remanded. All concur.

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JOHN COSGROVE, Respondent, v. BENJAMIN M. BURTON et al., Appellants.

Kansas City Court of Appeals, February 1, 1904.

1. ATTORNEY AND CLIENT: Contract: Performance: Fee. Where an attorney's fee is to be a certain per cent of the amount in litigation in case of a favorable termination, and pending the suit the client compromises over the attorney's objection, he would be still liable to pay the per cent agreed upon.

2. ———: ———: Quantum Meruit: Pleading: Instructions. A petition by an attorney to recover his fee stating that he had reduced his fee to the reasonable value of his services and that the defendants were justly indebted to him for the sum alleged, states an action in *quantum meruit* and not on contract; and the petition in question being ambiguous may have justified the defendants in insisting it was on contract and praying instructions on the theory, however, of a *quantum meruit*.

3. WITNESSES: Expert: Instructions: Jury. Juries are in no wise bound to accept the opinions of expert witnesses if they deem them unreasonable, but an instruction that they should consider their professional standing and experience is, however, proper, since the trial court should give the jury some guide for the consideration of such evidence.

Appeal from Howard Circuit Court.— *Hon. John A. Hockaday,* Judge.

AFFIRMED.

O. S. Barton, Wm. S. Shirk and *J. F. Rutherford* for appellants.

(1) The gist of the cause of action alleged is an express contract. Plaintiff can not enlarge his cause of of action by resort to general words in the petition, but will be confined to the specific allegations. Huston v. Tyler, 140 Mo. 263. (2) Plaintiff having elected

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to sue upon an express contract must recover on that contract or not at all in this suit. "This is true even though the evidence develops a cause of action on quantum meruit." Cole v. Armour, 154 Mo. 351; McCormick v. Transit Co., 154 Mo. 202; Clements v. Yeats, 69 Mo. 623; Fuerth v. Anderson, 87 Mo. 354; Construction Co. v. Iron Works, 169 Mo. 154; Raming v. Railroad, 157 Mo. 506; Whipple v. Peter Cooper Ass'n. 55 Mo. App. 554. (3) Plaintiff pleads a modification of his original contract. The petition states that, after the suits were determined, plaintiff reduced his fee to the sum of $1,000, and defendants agreed to settle same. The proofs showed that defendants made no agreement to such modification. The testimony of the plaintiff wholly fails to show a modification of the contract. To modify a contract, the consent of all the parties is required. Jacobs v. Maloney, 64 Mo. App. 270; Lee v. Porter, 18 Mo. App. 377; Sutter v. Raeder, 149 Mo. 297. Plaintiff, therefore, was not entitled to go to the jury upon the theory that he had reduced his fee to $1,000 and defendants had consented. (4) The court erred in refusing to give an instruction in the nature of a demurrer to plaintiff's evidence, as asked by defendants. There was a total failure of the *proof of the contract as alleged.* See authorities, supra. (5) The court erred in admitting the testimony of other lawyers as to the reasonableness of the fee charged. The action was on express contract. This evidence was, therefore, inadmissible, and was prejudicial to defendants. See authorities, supra. (6) But suppose we are wrong in our contention that this a suit based upon a specific contract, and suppose that the trial court did right in submitting the case to the jury on the theory that it was a *quantum meruit* case, then we contend that upon that theory the court erred in giving instructions numbered 1, 2, 3 and 4, in behalf of half of plaintiff. In these instructions the court tells the jury that they may find for the plaintiff in a sum

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not to exceed one thousand dollars. Henderson v. Mace, 64 Mo. App. 397; Mansur v. Botts, 80 Mo. 651; Plummer v. Troost, 81 Mo. 425. (7) Plaintiff's fifth instruction is wrong, and the giving same constitutes error. It tells the jury that they are not bound by the testimony of the expert witnesses. In the next sentence, however, it tells the jury that in considering such testimony the professional standing and experience of such witnesses must be taken into consideration in arrivin at a verdict. Cosgrove v. Leonard, 134 Mo. 419; Hull v. St. Louis, 138 Mo. App. 618; Kingsbury v. Joseph, 94 Mo. App. 298; Hoyberg v. Henske, 153 Mo. 63. Said instruction is also wrong, because it calls the jury's attention to the professional standing and experience of the expert witnesses and tells them that they must consider such standing and experience in making up their verdict. Hackman v. Maguire, 20 Mo. App. 286; Railway v. Stock Yards, 120 Mo. 541; Molch v. Railway, 82 Mo. App. 50; Thummel v. Dukes, 82 Mo. App. 53.

S. C. Major and *J. W. Cosgrove* for respondent.

(1) The principal point urged by appellant for a reversal of the judgment of the trial court, is that plaintiff declared upon a special contract and recovered upon a "*quantum meruit.*" This contention can not be upheld under the pleadings and the proof in this case. Davis v. Brown, 67 Mo. 313; Smith v. Culligan, 74 Mo. 387. (2) The petition should be construed libarally with a view to substantial justice between the parties. The substantial rights of the adverse party were not affected. Revised Statutes 1899, sections 629 and 659. (3) The judgment of the trial court should be sustained. No error was committed against appellants materially affecting the merits of the action. Walker v. Guthrie, 102 Mo. App. 420; Rogers v. Hopper, 94 Mo. App. 437; Christopher v. Kelly,

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91 Mo. App. 101; Summers v. Insurance Co., 90 Mo. App. 702; (4) Although appellants made oral objection to the introduction of testimony of reasonable value of respondent's services, on the ground that the petition declared upon contract, they clearly abandoned that theory of the case and waived that contention by asking the court to instruct the jury on the theory of a "*quantum meruit.*" Appellants must try their case on the same theory in this court as in the trial court. Hill v. Drug Co., 140 Mo. 433; Pope v. Ramsey, 78 Mo. App. 157; Stewart v. Outhwait, 141 Mo. 562. (5) The mere fact that the petition recited the history of the services rendered by respondent, did not make the action one upon contract especially so when the petition states that respondent's "services reasonably worth," etc. Warder v. Seitz, 157 Mo. 140; Henderson v. Mace, 64 Mo. App. 393; Mansur v. Botts, 88 Mo. 651; Williams v. Railway, 112 Mo. 491; Moore v. Mfg. Co., 113 Mo. 107; Redman v. Adams, 165 Mo. 60; (6) It is well-settled law in this State that juries should take into consideration the standing and reputation of expert witnesses. Rose v. Spies, 44 Mo. 20; City of Kansas v. Butterfield, 89 Mo. 646; St. Louis v. Ranken, 95 Mo. 189; Head v. Hargrove, 105 U. S. 45; Cosgrove v. Leonard. 134 Mo. 419.

BROADDUS, J.—Benjamin E. Nance of Howard county died on or about the 22nd of May, 1902, leaving two children, Laura Burton and Martha E. Jordan. By his last will he left the greater part of his estate to Laura and Benjamin N. Burton; but prior to making his will he had conveyed to the said Burton 600 acres of land. Afer the probate of her father's will, Martha E. Jordan brought suit to set it aside and also brought suit to annul the said deed of conveyance. The plaintiff, a counsellor and attorney at law, was employed by the defendants to represent their interests in said suits. Benjamin Burton was the executor under the will of

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said Nance and the defendant Patrick H. Burton is the husband of said Laura. It was also a part of plaintiff's employment to recover from one Dr. R. S. Holman two thousand dollars which it is claimed he had fraudulently obtained from the said Nance in his lifetime.

The petition alleges that the contract of employment between plaintiff and defendant was as follows: "Benjamin N. Burton, acting for himself and the other defendants herein, promised and agreed to pay the plaintiff for his services in and about procuring the return of said two thousand dollars from said Holman, and for his counsel and services rendered, and to be rendered, in said two above mentioned suits, the sum of five hundred dollars in the event the said Martha E. Jordan prevailed and the said Patrick H. Burton, Laura Burton and Benj. N. Burton and others were defeated therein, and in the event said suits of Martha E. Jordan against the defendants herein, and others, were decided in defendants' favor, the sum of ten per cent of the amount and value of the estate involved in said litigation."

It was shown that plaintiff acted as counsellor and attorney for defendants in said matters; that his services were reasonably worth one thousand dollars; and that the value of the estate involved was from $35,000 to $40,000; and that Dr. Holman returned to the executor the said $2,000. In the suit to set aside the will the defendants obtained a judgment establishing it; but it was proved that it was in the nature of a compromise the consideration for which was the sum of $5,000 paid by defendants to the said Martha E. Jordan. The suit to annul the said deed was dismissed at the cost of defendants.

The jury returned a verdict for plaintiff for $1,000.

It is the contention of defendants that as plaintiff's cause of action was on a contract he was not entitled to recover on *quantum meruit;* and that under his contract he was entitled to recover only $500 as the de-

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fendants did not prevail in said two suits. As to the latter contention, if the contract is to receive a strict construction, plaintiff would have been entitled to recover an amount equal to ten per cent on the value of the property in litigation, which would amount to at least $3,500. But defendants say that as a matter of fact, although the judgments are formally in their favor, it was the result of compromise for which they paid in the one case $5,000, and in the other the costs of the suit. But defendants have left out of consideration the fact that the compromise in question was made over the objections of plaintiff. There is no doubt but what defendants had the right to do so, but it does not follow that because they did it would affect the contract they had with the plaintiff and they would still be liable to him thereunder for an amount equal to ten per cent of the value of the property in dispute as both the will and deed were sustained.

The petition after setting out the contract and alleging plaintiff's compliance with its terms, defendant's success in the two suits, further states that he voluntarily reduced his fee to $1,000, which defendants agreed to settle and that the sum charged is a reasonable compensation for his services. The petition admits of two constructions: The plaintiff contends that it was for *quantum meruit;* defendant that it is a suit on contract. We believe the petition, fairly construed, makes the cause of action stated *quantum meruit.* The statement therein that he had voluntarily reduced his fee to $1,000 for his services, their reasonable value, and that the defendants were justly indebted to him for that sum, characterizes it as such. It nowhere alleges that the amount is due upon his contract or that the defendants have committed any breach thereof, nor has he asked to recover thereon. The most that can be said of the petition is that it is ambiguous. But it is sufficient to support a verdict. Notwithstanding defendants during the the trial insisted that the action was on contract, by

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a number of instructions they submitted their side of the case upon plaintiff's theory that the action was one for a reasonable compensation for plaintiff's services. Perhaps they were justified in so doing, taking into consideration the dubious character of the pleadings and their insistence until the last moment that the action was based upon contract.

The petition being sufficient upon which to base a verdict and judgment renders it unnecessary to notice many of the objections made to testimony introduced by plaintiff.

It is claimed that the court erred in giving the following instruction. "The court instructs the jury that they are not bound by the testimony of the expert witnesses but in considering such testimony the professional standing and experience of such witnesses must be taken into consideration in arriving at a verdict." The objection is to that part of the instruction which tells the jury that they must take into consideration the professional standing and experience of such witness. In Hoyberg v. Henske, 153 Mo. 63, it was held "Juries are in nowise bound to accept the opinions of expert witnesses if they deem them unreasonable, and an instruction in a civil action which so states is not error." In Cosgrove v. Leonard, 134 Mo. 419, the verdict was founded wholly as to the value of plaintiff's services upon the testimony of expert witnesses. The court held it was sufficient to support a verdict.

In Hull v. St. Louis, 138 Mo. 625, which followed the holding of the court in St. Louis v. Ranken, 95 Mo. 189, it was held proper to instruct the jury to give to the opinions of expert witnesses the weight to which they believed they were entitled. It is the opinion of some jurist that an instruction that calls attention to this testimony of witnesses as a class ought never to be given. But as such is now the law, and as juries may believe or disbelieve them at their own will, it certainly would be appropriate for them to take into consideration their

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professional standing and experience. The trial court ought, at least in an advisory capacity, be authorized to lay down some rule for the guidance of the jury in passing upon the credibility of such witnesses. And if the opinions of such witnesses are sufficient, as held in Cosgrove v. Leonard, supra, to support a verdict it was certainly not error to instruct the jury that in making up their verdict they must take into consideration their standing and experience in their profession. In fact, it is the duty of jurors in all cases not only to take into consideration the credibility of witnesses, but also every other circumstance tending to weaken or strengthen their testimony. And as the law is that the courts are authorized to instruct juries that they may disregard the evidence of expert witnesses, there can be no good reason assigned why jurors should be left without any direction whatever in weighing the force of such evidence. Other objections made to instructions are without merit. The cause is affirmed. All concur.

H. E. JONES, Respondent, v. W. A. HORN, Appellant.

Kansas City Court of Appeals, February 1, 1904.

1. **INSURANCE: Foreign Company: Statute: Agent's Liability.** No insurance company is authorized to do business in this State without a certificate from the superintendent of insurance; and a person acting as agent without obtaining from said superintendent a certificate is guilty of a misdemeanor and subject to a fine.

2. **——: ——: ——: ——.** When a statute imposes punishment which acts upon the offender alone and not as a reparation to the party injured, and where it is entirely within the discretion of the lawgiver, it will not be presumed that he intended that it should extend further than is expressed; and the statute regarding insurance imposes a penalty upon an agent for violation of its provisions and not as a reparation to the party injured.

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3. **APPELLATE PRACTICE: Court of Appeals: Decision of Supreme Court.** The court of appeals is bound to follow the latest case of the Supreme Court on any question.

4. **DECEIT: Insurance Agent: Pleading.** An insured who charges that the defendant, an insurance agent, represented that he would procure him insurance in a company doing business in the State fails to state a cause of action.

5. **——: ——: ——: Insolvency.** An insurance agent's representation that he would procure plaintiff a policy in a good company is tantamount to saying that he would procure a policy in a solvent company.

6. **TRIAL AND APPELLATE PRACTICE: Special Findings: Petition.** A respondent who saves no exception to a special finding of the trial court and takes no appeal therefrom, is not in a condition to question such finding in the appellate court when he is insisting that finding and judgment be affirmed.

Appeal from Cass Circuit Court.—*Hon. Wm. L. Jarrott*, Judge.

AFFIRMED.

Chas. W. Sloan and *Chas. W. Hight* for appellant.

(1) The court erred in overruling defendant's objection to any evidence under the petition. There was no statutory or other cause of action stated in petition. Barker v. Railroad, 91 Mo. 86; Oats v. Railway, 104 Mo. 514; Hickman v. Kansas City, 120 Mo. 110; Utley v. Hill, 155 Mo. 273; McIntosh v. Railroad, 103 Mo. 131; Poor v. Watson, 92 Mo. App. 89; Holverson v. Railway, 157 Mo. 251; Fusz v. Spaunhorst, 67 Mo. 256; Dunn v. Sanders, 48 Mo. App. 610. (2) Article 7, Revised Statutes 1899, requiring foreign companies to procure a certificate from the Superintendent of the Insurance Department of this State nowhere gave plaintiff Jones a right of action against defendant for damages in case of loss for doing business with or for the Mercantile Fire Insurance Co. of Chicago, when said company was not licensed to do business here. Article

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7, page 1872, Revised Statutes 1899. (3) If the petition be held to state a cause of action at common law we find it charges that the Mercantile Ins. Co. was insolvent on July 16, 1900, at the time the policy was issued to plaintiff, and that defendant for the purpose of inducing plaintiff to accept a policy in said company represented to plaintiff that the company was financially good and responsible and by reason of said company not being authorized to transact business in this State when defendant knew the company was insolvent and had not complied with the laws of the State, defendant thereby became liable, etc. The burden rested on plaintiff to prove insolvency. (4) There was no evidence in case or in finding of the facts by the court to sustain an action for deceit or fraud. Huston v. Tyler, 140 Mo. 252; Dry Goods Co. v. Coomer, 87 Mo. App. 404; Dulaney v. Rogers, 64 Mo. 201; Bank v. Byers, 139 Mo. 627; Utley v. Hill, 155 Mo. 232; Redpath v. Lawrence, 42 Mo. App. 101; Thompson v. Irwin, 76 Mo. App. 431; Green v. Worman, 83 Mo. App. 575; Paretti v. Rebenach, 81 Mo. App. 494. The mere finding of the court that defendant represented to plaintiff that said company was financially good and responsible would not support an action for deceit. Anderson v. McPike, 86 Mo. 300; Cornell v. Real Estate Co., 150 Mo. 383; Becraft v. Grest, 52 Mo. App. 586.

R. T. Bailey, Fyke Bros. and *Snider & Richardson* for respondent, submitted argument.

BROADDUS, J.—The plaintiff in the year 1900 was engaged in the mercantile business and owned two drugstores, one at Cleveland and the other at Kingsville, Mo., during which time defendant was engaged as a fire insurance agent at Harrisonville, Mo. On July 16, 1900, the defendant issued and delivered to the plaintiff a policy of insurance executed by the Mercantile Insurance Company, of Chicago, Ill., insuring plain-

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tiff's stock of drugs, fixtures, etc., in his store at Kingsville. Prior to this date, however, the defendant had issued a policy of insurance on plaintiff's goods at Cleveland. At one time appellant saw plaintiff at his stort in Kingsville when it was arranged that defendant should insure his goods at that place. He placed plaintiff's insurance in a company which was not doing business in small towns like Kingsville but the company cancelled the policy; whereupon defendant proffered to insure him in some good company He then returned to his home in Harrisonville and sent to plaintiff a blank application for insurance in said Mercantile Insurance Company, together with a printed financial statement, and also an application for insurance in the Marshall Town Mutual Insurance Co. In a letter which accompanied these applications he referred to the cancelled policy and stated that he would keep on and get plaintiff in a good company, and that both the companies to which applications were enclosed were good companies. The plaintiff signed the application to the Mercantile Insurance Co. dated July 13, 1900. Upon receipt of this signed application from plaintiff, the defendant inserted in it a description of the property, which plaintiff had omitted, and also filled out and signed the blank on the back of the application designated "Agent's Survey." On the following day he wrote to agents of the Insurance Co. at Chicago the following letter:

"Gentlemen:—Please find enclosed application for $1,800, insurance on drug stock of H. E. Jones, Kingsville, Mo. Premium $27. Please issue this policy and get it to me by return mail. The company I represent kick some on country stores, consequently if I can arrange with you I will give you a good string of business. Have you arranged with the State so that I can issue policies here, and send report of same to you? If you can do this I can give you a good volume of good bus-

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iness. I have a fine territory and my business will run $3,000 per year in premiums. Think hard on this, as I can and will do you good if you will place me in position to do so. Get this policy to me and be sure to get all matters as I have them here. Your part of the cash will come promptly. Awaiting your favorable reply, I am, very truly, etc."

The evidence does not show that the company made answer to the writer's inquiry whether it had arranged to do business in the State. However, the defendant received the policy issued by the company and on the 17th day of July he mailed it to the plaintiff with the following letter:

"Mr. H. E. Jones, Kingsville, Mo. Dear sir: Please find enclosed insurance policy No. 11166, Mercantile, of Chicago, Ill. This is a gilt-edge company as you will see from their statement enclosed, the only reason I did not put this in this company at first was I wanted to write the policy myself, but I have now arranged matters so it is just the same, and you have as good insurance as anybody in Kingsville. I have to pay these people spot cash so please enclose the premium, $27, in the return envelope, and everything is O. K. If you should have a loss wire the company at their expense and write me. I will see that you have prompt service of adjuster, and that you get a fair, square settlement," etc.

The plaintiff paid the premium which defendant after deducting his commission, forwarded to the insurance company. Subsequently, plaintiff's property was destroyed by fire. The company failed to pay his loss and he then ascertained that it was not authorized to do business in the State. Before the evidence was heard the court was asked to make a finding of facts. Amongst other things, the finding was that the defendant was acting as agent for the Mercantile Insurance Co; that

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the insurance was obtained upon the representations of defendant; that said company was financially good and responsible; that plaintiff, at the time he received the policy, did not know the company was not authorized to do business in the State; that defendant had such knowledge; that it was not shown that said company was insolvent at the date of the policy; and that it was not shown that it had any property in the State.

The plaintiff in his petition relies for recovery on the ground of the representations of defendant, the inducement for his acceptance of the policy that the company was "financially good and responsible;" that at the time of the issue of the policy the insurance company was insolvent, and that it is still insolvent; that defendant knew at the time of said insolvency of which plaintiff was ignorant, and that plaintiff did not know that said company was unauthorized to do business in this State. The finding was for plaintiff.

At the beginning of the trial defendant objected to the admission of any evidence on the ground that the petition did not state a cause of action. The statute prohibits insurance companies from doing business in this State unless they comply with certain of its provisions among which is one requiring them to deposit with the insurance commissioner a fund to be held by him as security for the benefit of the policy holders. When this is done and other requirements of the statute are complied with, the commissioner issues a certificate authorizing the company to do insurance business in this State. By section 7989, Revised Statutes 1899, no insurance company is authorized to do business in the State without such certificate, a copy of which shall be held by every agent or solicitor of such company in the State. Section 8001 provides, that any person who shall act as such agent or solicitor without first having obtained from the superintendent of insurance a certificate as required by said section 7989 shall be guilty of a misdemeanor and on conviction shall be fined not less than

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ten nor more than one hundred dollars, or imprisoned in the county or city jail not less than ten days nor more than six months, or by both such fine and imprisonment.

It is contended by defendant that where a statute creates a duty and imposes a penalty for failure to perform it, the penalty so prescribed is exclusive. In Utley v. Hill, 155 Mo. 232, the court so held. That was an action by a depositor against the directors of the bank for deceit, "charging that plaintiff was induced to make such deposits by reason of false and fraudulent representations that the bank was solvent. Such representations consisting of reports made to the Secretary of State, as required by section 2752, Revised Statutes 1889. That case and the one under consideration here are similar in principle. This is what might be called an action of deceit, the misrepresentation consisting in the fact that defendant stated he would procure plaintiff insurance in a good company, whereas he procured him insurance in a company that was not authorized to do business in the State. In the Utley case the court cited many authorities to support the holding, among which was that of Wells v. Supervisors, 102 U. S. 625, and quoted the following language: "When a law imposes a punishment which acts upon the offender alone and not as a reparation to the party injured, and where it is entirely within the discretion of the lawgiver, it will not be presumed that he intended that it should extend further than is expressed." The statute regulating insurance like that in relation to banks, imposes a penalty upon the agent for a violation of its provisions and not as a reparation to the party injured.

The plaintiff has cited decisions of the courts of other States to the effect that the representations of defendant that he would procure for him a good policy, imported that it should be the policy of a company that was authorized to do business in this State and that the Mercantile Insurance Company not being so authorized was as a matter of law insolvent. Such was the holding

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in Landusky v. Bierne, 80 N. Y. Supp. 238. And it was further held in said case that the policy itself was invalid. The law is different in that respect in this State. Our courts hold that such policies are not invalid. See Ins. Co. v. Railroad, 149 Mo. 165. Plaintiff also cites the case of McCutcheon v. Rivers, 68 Mo. 122, in which an agent had received a premium for a policy from an insurance company whose authority to do business in the State had been revoked. The court held that the party paying the premium could recover from the agent. If said case is to be considered as having any bearing here it is certainly in conflict with the Utley case, supra. The opinion is short, only a few lines, and no reason whatever is given for the holding. Whatever may be its effect we are bound to follow the later case.

It therefore necessarily follows from what has been said that the representations relied on, though none was in fact made, that the defendant would procure plaintiff insurance in a company doing business in the State, would not render defendant liable in this action.

The burden was there upon the plaintiff to prove the insolvency of said company. This he claims that he did. The representation of the defendant was tantamount to saying that he would procure plaintiff a policy in a company that was solvent. The plaintiff insists that he established by evidence that said Mercantile Insurance Company was insolvent at the time the policy was issued. But the difficulty is that the court found that he failed to prove such fact. The plaintiff made no exception to such finding and has taken no appeal therefrom. On the contrary, he is here insisting that the finding and judgment be affirmed. As he invokes the finding he is precluded from denying its truth in any respect. Besides, there was evidence tending to support it.

As the defendant incurred no liability other than the penalty imposed by the statute for insuring plain-

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tiff's property in a company not authorized to do business in the State, and as there is no presumption of insolvency because said company was not so authorized to do business, and a finding against plaintiff as to such insolvency, the plaintiff was not entitled to recover on any theory of the case.

As the questions decided are conclusive of the case, we deem it unprofitable to pass upon other questions raised by the defendant.

For the reasons given the cause is reversed. All concur.

A. J. POWELL etux., Respondents, v. BROOKFIELD PRESSED BRICK AND TILE MANUFACTURING COMPANY, Appellant.

Kansas City Court of Appeals, February 1, 1904.

1. APPELLATE AND TRIAL PRACTICE: Pleading: Amendment: Aider by Answer. A petition against a brick manufacturing company for destroying plaintiff's crop by gases from its kilns, alleged that the defendant's work was negligently done. After the evidence was in the plaintiff amended by striking out the negligence, and the defendant answered and the trial went on and the case was submitted on the amended pleadings. *Held*, that the change of the cause of action, if any, was waived by the answer, and the appellate court can not consider such objection.

2. NUISANCES: Pleadings: Damages. In an action to recover damages for a nuisance it is unnecessary to aver that the acts were unlawfully done. The cause of action is the wrong suffered, and the facts producing the wrong are the facts to be pleaded, and the amended petition is held to meet the requirements of the rule.

3. ———: Damages: Gases. The test of a nuisance is not the damage simply, but damage resulting from the violation of the legal right of another; and the stealthy attack of an unseen element poisoning the air is a violation of right as much as an open assault.

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4. ——: ——: ——: **Corporations.** An incorporated brick manufacturing company has no license to create a nuisance, and the burning of brick is not in itself a nuisance, though a nuisance in itself may be carried on in a proper place where it produces no injury.

Appeal from Linn Circuit Court.—*Hon. John P. Butler,* Judge.

AFFIRMED.

Lander & Lander for appellant.

(1) Defendant corporation was legally authorized and licensed to establish its brick plant, and to manufacture, burn and sell brick; the plant is established on the company's own ground. The trial court overlooked or disregarded the well defined legal distinction between acts done under authority, permission or license of the law, and acts done by one not so authorized. Bishop's non-contract law presents the doctrine as follows, section 425: "If a statute or a municipal by-law, valid in law, authorizes a thing to be done, it is not a nuisance, though of a sort which would be such but for the authorization." Supported in note 6, by the following authorities: Miller v. New York, 109 U. S. 385; Sawyer v. Davis, 136 Mass. 239; Railway v. Truman, 11 Mo. App. 45; Lewis v. Stein, 16 Ala. 214; Atty.-Gen. v. New York, etc., 9 C. E. Green 49; Danville, etc., Red. v. Commonwealth, 23 Smith (Pa.) 29; Cogswell v. Railroad, 4 Cent. 229. (2) The amended petition on which the case was finally tried charges no negligence or carelessness on the part of the defendant company. The evidence fails to show any negligence, carelessness, fault, wrongdoing or want of skill, care or caution on the part of the company in the construction, use and operation of its brick kilns; the trial court so found when the case was taken from the jury. This record presents a clear case of *damnum absque injuria* and nothing else. (The literal transla-

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tion, "Damage without injury," is a little contradictory; the better meaning is injury without wrong.) Penn. Coal Co. v. Sanderson, 113 Pa. St. 126; Howland v. Vincent, 10 Met. (Mass.) 371; People v. Canal Board, 2 N. Y. Sup. Ct. 275; Thurston v. Hancock, 12 Mass. 220; Benton v. Holland, 18 John. (N. Y.) 92; Palmer v. Mulligan, Cai. Rep. (N. Y.) 308; Rosce v. Buchanan, 51 N. Y. 477; Menken v. City Atlanta (Ga.), 2 S. E. 559. Missouri cases on the same doctrine as follows: Colier v. Ray, 48 Mo. App. 398; Mining Co. v. Morning Star Co., 50 Mo. App. 535; Miller v. Martin, 16 Mo. 508; Clark's Admr., v. Railroad, 36 Mo. 203; Abbott v. Railway, 83 Mo. 271; Jones v. Railway, 84 Mo. 151; Moss v. Railway, 85 Mo. 81.

A. A. Bailey for respondents.

(1) "A legislative authority to carry on the work of operating a brick kiln is not a defense to an action for a nuisance created in carrying on the work." State ex rel. v. Board of Health, 16 Mo. App. 8, 59 Mo. App. 59; 16 Am. and Eng. Ency. of Law (1 Ed.), 949; Campbell v. Seaman, 20 Am. 567 (63 N. Y. 568). (2) "A corporation may be liable in damages for a nuisance." 4 Am. and Eng. Ency. of Law (1 Ed.), 258; Railroad v. Fifth Baptist Church, 108 U. S. 317. "It is now well-settled law that a corporation is equally responsible as an individual for the wrongs it commits." Alexander v. Relfe, 74 Mo. 495; Soulard v. St. Louis, 36 Mo. 546.

SMITH, P. J.—The plaintiffs were the owners of a tract of land abutting against the right of way of the Hannibal & St. Joseph Railroad on the north and on which there was an inclosed cultivated field in which plaintiff had planted and growing a crop of corn. On the south side of the said railway and opposite to the land of plaintiff the defendant—a manufacturing com-

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pany organized under article 9, chapter 12, Revised Statutes—owned a tract on which at a distance seventy-five feet south of said railroad's right of way it constructed and operated brick kilns for the burning of brick. The petition *inter alia* alleged:

"Plaintiffs further say that the defendant ever since April, 1902, until the present time, has kept and maintained a large number of fires and furnaces burning in its said brick kilns and drying houses, and that said fires and furnaces have constantly and continuously, both day and night, produced, generated and emitted large quantities of smoke, noisome and noxious vapors and sulphurous fumes, poisonous to vegetation. And plaintiffs say that the defendant has during all said time (carelessly and negligently), and unlawfully permitted said smoke, vapors and fumes to escape from its said fires and furnaces, and has (carelessly, negligently) and unlawfully, permitted said smoke, fumes and vapors to escape close to the surface of the earth, and has (negligently, carelessly) and unlawfully failed and refused to build chimneys or smoke stacks to carry the same up into the air high enough to pass away without injuring plaintiffs' said crop, and has (carelessly, negligently) and unlawfully, during all of said time, fed its said fires and furnaces with soft or bituminous coal as fuel, which coal was highly charged with sulphur, sulphurous compounds and black jack, and which coal produced and generated when burned, smoke and vapors and fumes most poisonous and deadly to vegetation, all of which was well known to defendant, its officers, agents and servants. And that the defendant constructed its said furnaces in and about its said brick kilns and drying houses in such a (careless, reckless and improper) manner that the same did not properly consume the coal fed to them as fuel, but caused and permitted large quantities of said coal to smolder and generate large quantities of poisonous smoke and fumes that would not have been generated provided said furnaces had been

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properly constructed and had smokestacks connected therewith sufficiently high to cause the said furnaces to draw; and that the defendant by and through itself, its officers, agents and servants, during all of said time, fired, fed and maintained its said fires and furnaces in such a (reckless and careless) manner with the coal aforesaid that the said fires and furnaces were constantly kept clogged and overcharged with the said coal, and that by reason thereof the said fires and furnaces could not and did not draw properly, which caused said fuel to smolder and generate and emit large quantities of such smoke, vapors and fumes which escaped from the mouths of furnaces and was not sufficiently heated and rarified to raise above the surface of the ground. That by reason of the premises aforesaid the said poisoned and noxious smoke and vapors and poisonous and sulphurous fumes so caused, generated and produced by the defendant as aforesaid, did from time to time and for days at a time, during the entire growing season of vegetation of the present year, drift and pass over and enter into and spread and diffuse themselves over and upon, into, through and about plaintiffs' said corn so growing as aforesaid on the said land owned and occupied by plaintiffs as aforesaid, and plaintiffs' said cornfield and the air over, through and about the corn growing in said field was thereby greatly filled and impregnated with said smoke, vapors and fumes, and the said smoke, vapors and fues so caused, generated, produced and permitted to escape by the defendant as aforesaid, and so passing and drifting into and among plaintiffs' said growing crop of corn as aforesaid, did kill, injure, poison and destroy all the corn and corn plants so growing on ten acres of the land so owned and occupied by plaintiffs as aforesaid, so that plaintiffs' said corn crop on said ten acres of land is wholly worthless."

There was a trial and at the conclusion of the evidence the defendant requested the court to tell the jury;

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that under the issues made by the pleading the plaintiff was not entitled to recover, unless it was found by the jury that the injury to the plaintiffs' growing corn was caused by the negligent manner in which defendant's brick kilns were constructed and used; and thereupon the plaintiffs requested and the court granted them leave to amend their petition by striking therefrom wherever they occurred the words "carelessly and negligently." The defendant filed its motion to strike out the amendment on the ground that it constituted a departure from the original cause of action. This motion was by the court overruled. By agreement of parties the jury was discharged and the cause was submitted on the evidence to the court without instructions and whose finding and judgment was for plaintiffs, and defendant appealed.

Whether the amendment changed substantially the claim set forth in the original petition is a question which we need not stop to examine for the reason that it appears that after the motion to strike out was overruled defendant filed an answer and the case was tried on the issue joined. It appears from the record that the cause was submitted to the court on the amended petition and answer. It is thus seen that there was an answer interposed to the amendment and on the issue so joined the cause was tried. This amounted to a waiver of the defendant's right to have the ruling on the motion to dismiss reviewed by us. Scovill v. Glasner, 79 Mo. 449; Pickering v. Tel. Co., 47 Mo. 457; Sauter v. Leveridge, 103 Mo. l. c. 621; West v. McMullen, 112 Mo. l. c. 409; Holt v. Cannon, 114 Mo. l. c. 519; Leise v. Meyer, 143 Mo. l. c. 556.

In the original petition both the construction of the brick manufacturing plant and the manner in which it was operated was characterized as negligent and careless. In the amendment this characterization was omitted and the allegations thereof in other respects were unchanged. It was not necessary to charge the

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acts, of which the plaintiffs complain, were unlawfully done. It was only required to allege in substance facts which the law would say were unlawful or wrongful. As to whether or not the acts complained of constituted a nuisance and were therefore unlawful or wrongful was a question of law to be determined by the court. The cause of action is the wrong that has been suffered and the facts that show the wrong show the cause of action; they are the facts to be found; and upon principle they are the facts to be stated by the pleader. Thomas v. Cannery Co., 68 Mo. App. 350; Bliss on Code Plead., sec. 151. The facts stated in the amendment we think are sufficient to meet the requirements of the rule; and, if proved, were ample to entitle the plaintiff to a recovery.

An actionable nuisance is anything wrongfully done or permitted which injures another in the enjoyment of his legal rights. Paddock v. Somes, 102 Mo. l. c. 237; Cooley on Torts (2 Ed.), 670; Railway Co. v. Case, 38 Ohio St. 453. The test of nuisance is not injury and damage simply, but injury and damages resulting from the violation of the legal right of another. If there is no nuisance, there is no action however much of injury and damage may ensue, but if a right is violated there is an actionable nuisance even though no actual damage results therefrom. Woods, Law of Nuisances (2 Ed.), 1015, and cases cited. The right of one to be secure against the undermining of his buildings by water, or the destruction of his crop, or the poisoning of the air by the stealthy attacks of an unseen element, is as complete as his right to be protected against open personal assaults or the more demonstrative, but not more destructive, trespass of animals. Cooley on Torts (2 Ed.), 670.

The defendant was an incorporated manufacturing company and was authorized by its charter—article 9, chapter 12, Revised Statutes — to make, manufacture and burn brick near the corporate limits of Brookfield,

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and to do this it was necessary to erect and maintain its several brick kilns, etc. Brick kilns have been held not to be nuisances *per se.* State v. Board of Health, 16 Mo. App. l. c. 12; Kirchraber v. Lloyd, 59 Mo. App. l. c. 62. A nuisance is not the necessary result of burning brick; and where a nuisance is not the necessary result of the work authorized, legislative authority to create a nuisance will not be inferred from any license or authority to carry on the work, and legislative authority merely to carry on the work will not be a valid defense to a public prosecution *or to a private action for a nuisance created in carrying it on.* What was not contemplated in a grant is not authorized by it. Thus, legislative authority to construct a canal or to dam a stream will not protect the grantee or licensee from nuisances created by the stagnancy of the water occasioned thereby. Clark v. Mayer, 13 Barb. 32; People v. Gas Light Co., 64 Barb. 55; Reg. v. Bradford, 6 B. & S. 631. Even what is a nuisance *per se* may be carried on in a remote locality so as to be no common annoyance to the public. And, on the other hand, what is not a nuisance *per se,* such as a trade as has been harmlessly and beneficially carried on for years in a particular locality, may become a public nuisance without any change in the way in which it is conducted by reason of public streets laid out near it, or by numerous dwellings erected in its vicinity, so as to become a serious annoyance. The business of burning brick is a lawful and necessary business and the question as to whether it is a nuisance or not is to be determined largely by the surroundings of the brick kiln. It is thus seen that the authority conferred by the defendant's charter to construct and operate a brick manufacturing plant is not a valid defense to a private action like this for a nuisance created in carrying it on. The license granted to defendant to construct and operate a brick manufacturing plant did not carry with it the right to so operate it as to become a nuisance to adjacent or neighboring landed properties.

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In Campbell v. Seaman, 63 N. Y. 568, it was held that where one manufacturing brick upon his land used a process in burning by which noxious gases were generated which were borne by the winds upon the adjacent lands of his neighbor, injuring and destroying trees and vegetation, was a nuisance, and that the injured party might maintain an action to recover damages therefor. In the course of a very able and elaborate opinion in the case by Justice Earl it was said that, "it is a general rule that every person may exercise exclusive dominion over his property and subject it to such uses as will best subserve his private interests. Generally, no other person can say how he shall use, or what he shall do with his property. But his general right of property has exceptions and qualifications. *Sic utere tuo, ut alienum non laedas,* is an old maxim which has a broad application. It does not mean that one must never use his own so as to do any injury to his neighbor or his property. . . . But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If he makes an unreasonable, unwarrantable or unlawful use of it so as to produce material annoyance, inconvenience, discomfort or hurt to his neighbor, he will be guilty of nuisance to his neighbor. . . . As to what is a reasonable use of one's property can not be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality and under some circumstances may be lawful and reasonable which, under other circumstances, would be unlawful, unreasonable and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient."

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In Beadman v. Treadwell (31 Law Jour. N. S. 873), an injunction was granted restraining the burning of brick within 650 yards of plaintiff's dwelling, the court holding that the burning of brick within 350 yards of plaintiff's residence was a nuisance. The vice chancellor said that his mind was satisfied that there had been an actual, positive injury to plaintiff and that the comfort and enjoyment of his mansion house were injured; that the trees planted and standing and growing for ornament had been in some cases entirely destroyed, and in many cases injured. When Bradford v. Turly (31 Law. Jour. N. S. Q. B. 286), reached the Exchequer Chamber it was there held that it was no answer for a nuisance creating an actual annoyance and discomfort in the enjoyment of neighboring property that the injury resulted from a reasonable use of the property and that the act was done in a convenient place and that the same business had been carried on in the same locality for seventeen years.

Many other cases of similar import might be cited. It is sufficient to say that within the rules thus referred to it can not be doubted that the defendant's brick burning was a nuisance to plaintiff. The defendant's plant was about 200 feet from the plaintiff's field of corn. The smoke and gases escaping from the defendant's brick kilns indisputably destroyed plaintiff's growing crop of corn. And it is no answer for the nuisance that the injury resulted from a reasonable use of the defendant's brick manufacturing plant or that the defendant's brick kilns were built after the most approved patterns, and that it employed skilled persons in burning the brick, for the fact remains undisputed that the smoke, gases and vapors escaping from the defendant's brick kilns settled upon and destroyed the plaintiff's crops and thus greatly injured him in the enjoyment of his property. Though the defendant was an incorporated company—an artificial entity—we can discover nothing in its charter that conferred upon it in respect

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to the operation of its plant any greater privilege or right than that of a natural person. There is nothing there that expressly or by implication gave it the right to so operate its plant as to render it a nuisance as to plaintiffs. It is clear to us from the evidence that in the operation of the defendant's plant the principles of the maxim *sic utere,* etc., already quoted, have been utterly disregarded. Nor do we think the use in *damnum absque injuria*—one where there is a loss for which the law provides no remedy.

We think the judgment ought to be affirmed, and it is accordingly so ordered. All concur.

E. H. PENDLETON, Respondent, v. H. H. ASBURY, Appellant.

Kansas City Court of Appeals, February 1, 1904.

1. **CONTRACTS: Public Policy: Agreement Between Rival Newspapers.** An agreement between proprietors of rival newspapers that they will bid the same for all public printing in the county, and that such bid shall not be less than the maximum legal rates, is a contemplated raid on the county treasury and is *contra bonos mores* and can not be upheld and enforced.

2. ———: ———: **Trial Practice.** When any party to an illegal contract can not open his case without showing he has broken the law the court will not assist him whatever his claim in justice may be.

Appeal from Dallas Circuit Court.—*Hon. Argus Cox,* Judge.

REVERSED.

J. W. Miller and *John S. Haymes* for appellant.

(1) The contract sued on is without consideration. It is void, because illegal and against public policy.

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Where plaintiff's own evidence shows the transaction to be illegal or against public policy, he can not recover. Parsons v. Randolph, 21 Mo. App. 353; Harrison v. McCluney, 32 Mo. App. 481; Woods v. Mosier, 22 Mo. 333; Lawlin v. Bradley, 13 Mo. App. 361. (2) Contracts that may injuriously affect the public will not be enforced. Nash v. Kerr, 19 Mo. App. 1; Reed v. Pepper, 2 Mo. App. 82; Kribben v. Haycraft, 26 Mo. 396; Porter Jones, 52 Mo. 399. (3) Where parties enter into illegal contract the law will leave them where they placed themselves. Attaway v. Bank, 93 Mo. 485. A contract which is illegal in part is illegal in all. Summers v. Summers, 54 Mo. 340; Bick v. Seal, 45 Mo. App. 475; Wait v. Bartlett, 53 Mo. App. 378. (4) And there is no difference in an illegal contract and one immoral or against public policy. Buckingham v. Fitch, 18 Mo. App. 91. The contract is void for want of mutuality. Bishop on Contracts (Edition 1878), sec. 429; Webster's Dictionary, title "Mutuality;" Burrell's Law Dictionary, title "Mutuality;" 1 Carson on Contracts (6 Ed.), side page 449.

O. H. Scott for respondent.

(1) There is not a scintilla of evidence in this case to the effect that the parties to this cause made any agreement fixing the price of printing the financial statement for the county, or the constitutional amendments for the State. The contract was perfectly proper. Both were publishing papers, and the publication of both papers would give greater publicity to these matters of general public interest. The agreement was not against public policy, but was legitimate and commendable. (2) A contract will not be presumed against public policy when it can be construed as valid and legal. Beach on Contracts, secs. 1460, 1498; Haarstick v. Shields, 11 Mo. App. 602. (3) Defendant (appellant) had the contract of printing the constitutional amendments. For the

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good of the public he could extend the publication to another paper and agree to pay therefor. Having done this and accepted the benefits he shall comply with his contract. Tureman v. Stephens, 83 Mo. 218; Ferry Co. v. Railroad, 73 Mo. 389. (4) Regardless of the contract as to county printing he is under implied obligation to pay the debt sued for in this action, and is estopped from setting up the defense pleaded.

SMITH, P. J.—This is an action on account to recover $55.62 for publishing certain constitutional amendments in the Buffalo Reflex, a newspaper of which plaintiff was the proprietor. The plaintiff had judgment in the circuit court and the defendant appealed.

The facts appearing directly, or by inference, from the record are that in 1900 at the county of Dallas, in this State, the plaintiff was the publisher of a newspaper called the Reflex, and the defendant was the publisher of that called the Record. These two papers the expositors of the principles of opposing schools of political thought. They were published in a county very limited in territory, sparsely populated and moderate in wealth. The gleaning for two newspapers in such a narrow and scant field was by no means encouraging. And just how to build up and maintain two rival newspapers in it became a problem that sorely taxed the combined genius of both plaintiff and defendant. The paramount question was constantly arising and "like the ghost of Banquo will not down" was, "what shall I do to be saved?" And while their political, financial, and perhaps social interests under other conditions would have geen inimical, the one to the other, yet, the very barrenness of the field and the helplessness of the condition in which they found themselves was a warning to them that a protracted existence would be rendered possible only by a combination of their energies. Thus it was they became, "Two souls with but a single

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thought, two hearts that beat as one." A "fellow feeling made them wondrous kind," and under the influence of a menacing an adversity, "the lion and lamb" were made to lie down together in apparent peace. Such environment brought them closer together. Conference and suggestion resulted. After "taking counsel of their fears" they concluded it would be "unprofessional" for either to do any public printing for less than the "legal rates."

The plaintiff and defendant having the only two newspapers in the county entered into an agreement which provided, amongst other things, that each would bid the same rate for publishing the financial statement of the county, which they did accordingly. The county court seeing to what complexion it was thus reduced proposed to plaintiff and defendant that if they would each make the publication in his paper that it would pay the rate bid therefor dividing such amount equally between them. By this combination competition was eliminated from the problem and the public was forced to pay double what, but for such combination, it otherwise would have been required to pay for the publication.

By the agreement, to which we have already referred, the plaintiff and defendant were not to bid against each other for the county printing nor was either to do such printing for less than a rate agreed upon, and that each should publish the constitutional amendments and that the proceeds received for the current year for all State and county printing should be equally divided between them, or, as a witness for plaintiff testified, "they had an agreement about publishing the two accounts and that they were to divide up on them what they got out of them—divide up the spoils, was the way I understood it." The agreement covered all the State and county printing required to be done in the county. None of the county printing was to be done for less than the maximum rate allowed by law. The Sec-

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retary of State who, it may be inferred, belonged to the same political party as the defendant, was authorized by the statute to designate the newspaper in which the constitutional amendments were to be published in that county. The clerk of the county court who, it may be also inferred, was of the same political party as the plaintiff, was authorized to contract for the printing of the election ballots. It was not an unreasonable expectation that the Secretary of State would designate the defendant's paper as that in which the publication of the constitutional amendments should be made; nor was it to be less reasonably to be expected by the plaintiff that he would be awarded by the county clerk the job of printing the election ballots which was required to be done at the expense of the county.

The plaintiff and defendant each sharing in the common desire to realize as much as possible out of the public printing required in said county entered into said treaty stipulations to the further effect that neither would do any county printing for less than the maximum rate allowed by statute, and that each should publish the constitutional amendments, the county financial statement and that each should print one-half of the ballots to be ordered by the clerk, and divide equally the whole amount received; or, in other words, it was agreed that plaintiff and defendant should bid the same rate for the publication of the county statement and when made they would not only divide the proceeds arising from doing that printing, but, also, the amount received for all other printing done that year for either the State or the county. The manifest purpose of the agreement was to do away with competition for the publication of the county financial statement and to compel the payment of a double rate therefor, which was to be divided, and to secure a division between them of the proceeds arising from the doing of all the other public printing required in the county. The scheme was one that embraced the doing of several things, but the principal

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thing to be accomplished by it was to compel the county to pay a rate for the publication of the county financial statement sufficiently large and remunerative to justify not only a division of it, but of the proceeds of all the other public printing required in the county. The promise of the defendant to divide the proceeds received for the publication of the constitutional amendments was a part of the combination scheme.

The scheme provided by the agreement contemplated a spoliation—a raid on the county treasury. It was *contra bonos mores.* It must be condemned by every consideration of public policy. It can not be upheld. Parsons v. Randolph, 21 Mo. App. 353; Harrison v. McCluney, 32 Mo. App. 481. Though the amount in controversy is insignificant, yet the principle involved is one of the greatest importance.

It is true that the claim of the plaintiff is for the publication of the constitutional amendment; yet, this claim is founded on the illegal agreement—is a part of it, and without which it has no foundation on which to rest. But the plaintiff contends that as the agreement provided for the publication of the county statement in both papers that a greater publicity was given to it, and it was therefore not against public policy.

The Legislature has by statute required that a publication of the county financial statement be made in "some" (one) newspaper printed in the county—section 6793, Revised Statutes—and has fixed the maximum rate for such publication—section 4688, Revised Statutes. The effect of the agreement here was to require the county court to pay for the publication in two papers instead of one, and to pay just double what it otherwise would have been required to pay. The combination agreement so entered into and executed was, it seems to us, but a fraudulent trick by which the parties thereto were enabled to appropriate to their own use out of the county treasury a sum of money to which they had no lawful right. The rule has been declared to be that,

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when either party to the illegal contract or transaction applied to a court for aid, if the plaintiff can not open his case without showing he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. The principle of public policy is *ex dolo malo non oritur actio.* Hatch v. Hanson, 46 Mo. App. 323; Connor v. Black, 119 Mo. 126.

The plaintiff's cause of action was founded upon the illegal agreement to which we have referred and can not therefore be enforced. The instruction in the nature of a demurrer to the evidence should have been given. The judgment must be reversed. All concur.

CHARLES WEBER, Respondent, v. ANCIENT ORDER OF PYRAMIDS, Appellant.

Kansas City Court of Appeals, February 1, 1904.

1. **CONTRACTS: Non Est Factum: Pleading: Verification.** Although an answer denies the execution of a contract, its execution stands confessed unless the answer is verified.

2. **———: Corporations: Ultra Vires: Pleading.** The defense of *ultra vires* is affirmative matter and should be specially pleaded and if not so pleaded the corporation can not rely upon such defense.

3. **BENEFIT SOCIETIES: Medical Examination: Waiver.** The objection that the insured did not submit to a medical examination can not be heard after the contract has been entered into by the insurer.

4. **———: Form of Certificate: Waiver.** Where a benefit society issues its benefit certificate it can not defeat a recovery thereon because the certificate was not in the form prescribed by its executive council.

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5. ———: **Breach of By-Laws: Pleading.** An answer that merely states that the insured did not comply with the provisions of the by-laws is faulty, since it must specify in what the violation consisted.

6. ———: **Proofs of Loss: Denial of Liability: Waiver.** A denial *in toto* of all liability waives proofs of loss.

Appeal from Jackson Circuit Court.—*Hon. Roland Hughes,* Special Judge.

AFFIRMED.

John Sullivan for appellant.

(1) The court erred in admitting exhibits "Agy" and "bgy" as a contract binding appellant. (2) The court erred in ruling that a person could become a member by process of an attached "rider" to another society's certificate. (3) The court erred in admitting the alleged letter of Mr. Taylor in evidence. (4) The so-called "rider" contract, even if it could be made, was never completed by Mrs. Weber, and the court erred in admitting it. (5) The court erred in not sustaining the demurrer of defendant below at the close of plaintiff's case.

McCluer & Bowling for respondent.

(1) As the answer in this case was not verified as required by section 746, Revised Statutes of 1899, the contract sued on stood confessed as a valid instrument. The effect of failure to verify the answer has been taken up by the court in the case of Smith Company v. Rembaugh, 21 Mo. App. 390, and fully considered. (2) Appellant's second assignment of error is as follows: "The court erred in ruling that a person could become a member by process of an attached 'rider.'" There are numerous reasons why this assignment is not well

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taken. Vining v. Ins. Co., 89 Mo. App. 311; Henning v. Ins. Co., 47 Mo. 425; Baile v. Ins. Co., 73 Mo. 371; Worth v. Ins. Co., 64 Mo. App. 583; Duff v. Fire Assn., 56 Mo. App. 355; Duff v. Fire Assn., 129 Mo. 460; Drug Co. v. Robinson, 81 Mo. 18; Welch v. Brewing Co., 47 Mo. App. 608; Glas v. Brewing Co., 47 Mo. App. 639; Grohman v. Brown, 68 Mo. App. 636; Hall v. Bank, 45 Mo. 418; Cauveren v. Ancient Order of Pyramids, 72 S. W. 141; Hirschl on Fraternal Societies, p. 34; Bacon on Benefit Societies, sec. 434; Harvey v. Grand Lodge, 50 Mo. App. 472; Chadwick v. Triple Alliance, 56 Mo. App. 463; Grand Lodge v. Reneau, 75 Mo. App. 402. (3) Appellant's third point is as follows: The court erred in admitting the alleged letter of Mr. Taylor in evidence. There was no error in the admission of this letter.

ELLISON, J.—This action is based on a benefit certificate of life insurance. The judgment in the trial court was for the plaintiff.

It appears that plaintiff's deceased wife was a member of the order known as the "Knights and Ladies of the Fireside," and a benefit certificate of insurance was issued by that organization. Afterwards this was transferred to defendant, the latter issuing what is termed a "rider," whereby it contracted to, and did assume, the obligations and benefits of the original certificate. This rider appears to have been duly executed by defendant's officers and attached to the original.

The state of the pleadings practically settles the principal points in this case in favor of the plaintiff. The defense is based largely on the statement that defendant did not execute the rider contract: that is to say, that there was no proper proof of its execution by plaintiff. The answer was not verified by affidavit and therefore the contract made with the defendant as charged and as filed with the petition, stood confessed.

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Smith v. Reinbaugh, 21 Mo. App. 390; Thomas v. Ins. Co., 73 Mo. App. 371.

But defendant argues that if the contract was executed by defendant as appears on its face, it is still of no force or obligation, being *ultra vires* the power of the corporation to receive the deceased as a transferee, or to issue the "rider" contract in the manner claimed. The defense of *ultra vires* is affirmative matter which should be specially pleaded. It was not so pleaded by defendant and consequently it can not be heard on that head. Williams v. Verity, 73 S. W. 732; that case cites Louisville Tobacco Co. v. Stewart, 70 S. W. 285. It is likewise supported by Griesa v. Ins. Co., 15 N. Y. Supp., affirmed in 133 N. Y. 619.

Defendant sets up one of its by-laws which requires as preliminary to the issuance of a benefit certificate, that there shall be a medical examination approved by its medical director. And that the deceased did not furnish such examination. It may be answered to this, that that was an objection which should have been made by defendant before entering into the contract. By executing the contract, defendant waived the prerequisites it prescribed as necessary to induce it to become obligated. Watts v. Ins. Co., 111 Iowa 90; McElwain v. Ins. Co., 63 N. Y. Supp. 293.

Defendant next sets up that its by-laws require that all benefit certificates issued shall be on forms furnished by the executive council. But nevertheless it made the present contract without requiring that form and can not now complain. In this connection, defendant says that no certificate duly signed by the proper officers was issued to deceased. This objection is disposed of in what we said as to there being no denial of the contract under oath.

It is next set up by answer that deceased did not comply with a certain section of the by-laws as to when and how payments were to be made. The particulars of the breach of this law are not alleged, the answer

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merely stating that she "did not comply with the provisions of said requirements." The law referred to sets forth in detail what is to be done in certain contingencies and when assessments are to be credited to the member, etc. The answer should have specified wherein deceased violated the law.

It lastly sets up by answer that no death proofs were made, or offered. It was not necessary that proof should be made, since defendant denied *in toto* all liability.

After a full examination of the points made against the judgment we conclude they are not sufficiently well founded to authorize our interference. In our view, considering the issues as made by the pleadings, plaintiff did not need some of the evidence he offered.

Under the case made by the pleading and proof the judgment was manifestly for the right party and will be affirmed. All concur.

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By BEN ELI GUTHRIE.

ABANDONMENT. See **Husband and Wife, 1.**

ABUSE OF PROCESS. See **Action, 1, 2, 3, 4, 5.**

ACTION. See **Construction, 2; Convicts, 1, 2, 3, 9; Damages, 4; Debtor and Creditor, 1; Dramshops, 1; Master and Servant, 5; Reward, 1, 2; Sales, 3, 9.**

1. **Abuse of Judicial Process: Garnishing Exempt Wages.** An action for abuse of judicial process will be against an execution creditor who wrongfully, maliciously and without probable cause, repeatedly garnishes the exempt wages of his debtor. Cooper v. Scyoc, 414.

2. **Same: Claiming Exemption: Instruction.** In an action for abuse of judicial process in garnishing plaintiff's exempt wages, an instruction which told the jury that plaintiff was the head of a family, and his employer was not chargeable as garnishee on account of wages due him for the last thirty days' service, and defendant had no right to summon the garnishee on account of such wages, properly declared the law, there being no evidence that plaintiff had waived his right to claim his exemptions. Ib.

3. **Same: Exemplary Damages.** Such an action is one in which exemplary damages may be allowed in the discretion of the jury. Ib.

4. **Same: Loss of Time: Remote Cause.** But plaintiff can not recover damages for loss of time by reason of being discharged by his employer and thrown out of employment, on account of the repeated garnishments; the cause of the discharge is too remote. Ib.

5. **Same: Creditor and Officer Jointly and Severally Liable.** The officer who serves the writ and the execution creditor who directs his action, are jointly and severally liable for abuse of the process of garnishment. Ib.

ADMINISTRATION. See **Taxbills, 5; Wills, 1, 2.**

1. **Demands: Attorneys' Fees: Expenses.** Attorneys' fees are not, strictly speaking, a claim against the estate in the hands of an executor, but are expenses of administration which the probate court should adjust on settlement with the executor. Stephens v. Cassidy, 210.

2. **Same: Expenses: Attorneys' Fees: Circuit Courts: Jurisdiction.** Circuit courts have jurisdiction to establish demands

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against estates, but the statute in no sense confers jurisdiction on such courts to adjust the claims of an executor for his services and expenses against the estate in his hands; that matter is wholly within the jurisdiction of the probate court. Ib.

3. **Affidavit to Demand: Agency.** Section 196, Revised Statutes of 1899 requires that an affidavit to a demand against an estate, which is made by an agent, shall state the fact of such agency, though it does not require the affidavit to contain a statement that the agent had the management of the business out of which the demand grew. Dawson v. Wombles, 272.

4. **Same: Amendment.** If an affidavit to such a demand does not disclose that it was made by the agent of the claimant, the defect may be cured by amendment. Ib.

5. **Exhibition of Demand: Statute: Notice.** A notice of a demand against an estate set out in the opinion is held not to meet the requirements of section 188, Revised Statutes 1899, in that it does not state the "amount and nature of the claim." Corson v. Waller, 621.

6. **Same.** Said notice of plaintiff's desire to establish his demand meets the requirements of section 197, Revised Statutes 1899, since it contained "copies of the instruments of writing on which the demand was founded." Ib.

7. **Same: Pleading.** No formal pleadings are required in the probate court, but common justice requires such a statement to be full and specific enough to apprise the administrator of the facts involved. Ib.

8. **Same: Appeal: Amendment.** A cause of action may be amended in the appellate court to supply deficiencies or omissions, but no new item or cause of action can be added; and if the original demand is a mere nullity, it is not amendable. Ib.

9. **Same.** A demand set out in the opinion, while defective and insufficient, is held susceptible of amendment. Ib.

10. **Renting Real Estate: Statute: Emblements.** By section 130, Revised Statutes 1899, the executor may under the order of the probate court take possession of the real estate and rent the same to pay debts, but this will not deprive the devisee or his tenant of his emblements. Brent v. Chipley, 645.

11. **Same: Possession.** The statute requires the executor under such an order to take possession and rent, and he is not authorized to step in and appropriate the contract made by the devisee with the tenant and collect the rents from the tenant. Ib.

12. **Same: Attornment.** When such order is made by the probate court the tenant may with the consent of the devisee attorn to the executor who may then collect the rents; but this case seems to have been tried on another theory. Ib.

AFFIDAVIT. See **Administration, 3, 4; Appeals, 2; Justices' Courts, 3; Practice, Trial, 5, 6, 7.**

ALIMONY. See **Divorce.**

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AMENDMENT. See **Administration, 4, 8, 9; Appeals, 3; Pleading, 2, 3; Practice, Appellate, 16.**

Amendments are largely discretionary with the trial court, and in a cause pending in the circuit court, which had originated before a justice of the peace, an amendment showing that plaintiff was a corporation was properly allowed. U. S. Water & Steam Supply Co. v. Dreyfus, 434.

ANIMALS. See **Master and Servant, 6, 7.**

APPEALS. See **Administration, 8, 9; Practice, Appellate, 6, 10.**

1. **Statutory Right: Strict Compliance.** The right of appeal being purely statutory, a substantial, if not a literal, compliance with the statutory requirements in that respect, is necessary to confer jurisdiction upon the appellate court. Ark. & Okla. Railroad v. Powell, 362.

2. **Affidavit, Insufficient.** An affidavit for appeal which omits the statement of affiant's belief "that the appellant is aggrieved by the judgment of the court," is deficient in statutory recitals and can not give the appellate court jurisdiction of the cause. Ib.

3. **Same: Amendment.** And the appellate court has no power to make an order allowing the amendment of a defective affidavit for appeal, or the substitution of a new affidavit which will conform to the statute. Ib.

4. **Same: Waiver.** Nor can the respondent waive the question of defective affidavit for appeal; or estop himself to urge its insufficiency, by appearing in the appellate court and consenting to a continuance. Ib.

ARBITRATION AND AWARD. See **Insurance, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26.**

ATTACHMENT.

1. **Mortgage: Interplea.** A mortgagor interpleading in an attachment suit against his mortgagee claiming the attached property on the ground that the time of payment of the debt has been extended, must fail since he has no right to the possession of the mortgaged and attached property after the time originally set for the payment of the debt. Connorsville Buggy Co. v. Lowry, 186.

2. **Same: Evidence.** And such interpleading mortgagor can not show that another than the mortgagee has become owner of the debt, since he must recover on the strength of his own title and not on the weakness of his adversary's. Ib.

3. **Same: Extension of Payment. (Ellison, J., concurring.)** Where a mortgage does not contain an agreement for the extension of the mortgage itself alleged to have been made some time before it was executed, but did contain a provision for immediate possession on default, the prior oral agreement is of no avail. Ib.

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ATTORNEY AND CLIENT. See **Administration, 1, 2; Railroads, 21.**

1. **Contract: Performance: Fee.** Where an attorney's fee is to be a certain per cent of the amount in litigation in case of a favorable termination, and pending the suit the client compromises over the attorney's objection, he would be still liable to pay the per cent agreed upon. Cosgrove v. Burton, 698.

2. **Same: Quantum Meruit: Pleading: Instruction.** A petition by an attorney to recover his fee stating that he had reduced his fee to the reasonable value of his services and that the defendants were justly indebted to him for the sum alleged, states an action in *quantum meruit* and not on contract; and the petition in question being ambiguous may have justified the defendants in insisting it was on contract and praying instructions on the theory, however, of a *quantum meruit*. Ib.

BENEFIT SOCIETIES. See **Insurance, 1, 2, 3, 4, 27.**

1. **Construction of Constitution: Loss of Hand: Jury Question.** In an action for the loss of a hand by the holder of a beneficiary certificate in a mutual benefit association, whose constitution provided that if a member lose a hand, he should receive a certain sum, where the evidence of plaintiff showed that the hand was so injured as to be of no practical use, the question of whether there was loss of the hand was properly submitted to the jury. Sisson v. Supreme Court of Honor, 54.

2. **Same: Amendment of Constitution.** Where a member of such an association, in his application, agreed to conform to the constitution and rules of the order then in force or which might be adopted thereafter, he is bound only by such changes of rules and regulations as relate to his duties as member of the association, and not by changes which interfere with the essential provisions of his contract of insurance, unless such modifications of his contract are made with his express consent. Ib.

3. **Medical Examination: Waiver.** The objection that the insured did not submit to a medical examination can not be heard after the contract has been entered into by the insurer. Weber v. Pyramids, 729.

4. **Form of Certificate: Waiver.** Where a benefit society issues its benefit certificate it can not defeat a recovery thereon because the certificate was not in the form prescribed by its executive council. Ib.

5. **Breach of By-Laws: Pleading.** An answer that merely states that the insured did not comply with the provisions of the by-laws is faulty, since it must specify in what the violation consisted. Ib.

6. **Proofs of Loss: Denial of Liability: Waiver.** A denial *in toto* of all liability waives proofs of loss. Ib.

BILL OF EXCEPTIONS. See **Practice, Appellate, 3, 9, 10.**

BILLS AND NOTES. See **Instructions, 2; Interest, 1; Principal and Agent, 1; Witnesses, 2.**

1. **Lost Note: Indemnifying Bond: Approval of Bond.** Under section 745, Revised Statutes of 1899, in an action on lost notes,

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where the indemnifying bond required is filed prior to the trial and the approval thereof shown on the clerk's minute book, such entry will be presumed to have been made under direction of the court. Warder, Bushnell & Glessner Co. v. Libby, 140.

2. **Possession: Ownership.** The general rule that possession of personal property implies ownership does not apply to negotiable promissory notes not payable to bearer or holder. Tapley v. Herman, 95 Mo. App. 537, limited. Hair v. Edwards, 213.

3. **Same: Deceased Holder.** Possession of a note not payable to bearer nor indorsed in blank, is not *prima facie* evidence of ownership, but the presumption is that it belongs to the payee; nor is the rule different where such paper is found in the effects of a deceased person. Ib.

4. **Same: Defense of Fraud: Burden of Proof Shifted.** In an action on promissory notes by the indorsee, where the answer alleged that they were procured by fraudulent representations and without consideration, after defendant proved the fraud, the burden was then shifted to plaintiff to show by a preponderance of the evidence that it was a bona fide holder for value. Bank v. Hammond, 403.

5. **Same: Notice of Fraud.** Notice to the indorsee of a negotiable instrument purchased before maturity, of fraud in its procurement, which would defeat his action against the maker, must be actual knowledge of the fraud; mere knowledge of facts which would put a prudent man upon inquiry is not sufficient. Ib.

BROKERS.

Real Estate: Commissions: Sales: Pleading: Quantum Meruit. Where a real estate broker bottoms his action for commissions on a contract he can not, on failing to prove his contract, recover on *quantum meruit*, though a different rule prevails in justices' courts. McDonnell v. Stevinson, 191.

BURDEN OF PROOF. See **Bills and Notes**, 4; **Insurance**, 14; **Practice, Trial**, 4.

CHATTEL MORTGAGE. See **Attachment**, 1, 2, 3; **Mortgages**, 1; **Principal and Agent**, 1; **Witnesses**, 4.

Private Sale: Mortgagee as Trustee. The mortgagee in a chattel mortgage, who sells the mortgaged property at private sale under a power in the mortgage, is thereby trustee for the mortgagor and bound to make the property bring the best price obtainable, or stand the loss. Bank v. Wright, 242.

COMMISSIONS. See **Brokers**, 1.

COMMON CARRIERS.

1. **Carriers of Passengers: Duty of Carrier: Injuries While Alighting from a Car: Pleading and Proof.** In an action by a passenger for injuries received while alighting from a street car, the petition alleged that the defendant's servants, after the car had been stopped, caused it to suddenly start forward while he was proceeding to alight, whereby he was thrown and dragged, producing the injuries complained of. The evidence

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showed that the plaintiff indicated to the conductor his desire to get off, and, in obedience to the conductor's signal, the motorman slowed down the car, but could not bring it to a full stop on account of defective brakes, and the plaintiff, after the car had run past the stopping place and was going at the speed of an ordinary walk, undertook to get off, when the speed was suddenly accelerated whereby he was thrown and injured. *Held*, the evidence tended to prove the negligence alleged in the petition, that it was not the defective brakes, but the act of the motorman causing the car to start forward, which caused the accident. *Held* further, that the plaintiff was not bound to show that the defendant's servants knew his position when the speed was accelerated, since the conductor saw him leave his seat for the purpose of getting off the car; it was the duty of the conductor and motorman to hold the car for a reasonable length of time for plaintiff to get off in safety. (Per **Bland, P. J.**) Duffy v. Transit Co., 235.

2. **Conversion: Common Carrier: Honest Mistake.** Although a carrier, in converting to its own use chattels carried, acted under an honest mistake as to their ownership, it is nevertheless liable to the consignee in an action for conversion. Frazier v. Railroad, 355.

CONSIDERATION. See **Contracts**, 2; **Evidence**, 21; **Landlord and Tenant**, 6; **Tender**, 1.

CONVERSION. See **Common Carriers**, 2.

CONVICTS.

1. **Civil Death of Convict: Right to Sue One Convicted of Crime.** The civil death which attaches, under section 2382, Revised Statutes of 1899, to a person convicted of an infamous crime, destroys his right to sue or make contracts, but does not protect him against the suits of others. Gray v. Gray, 520.

2. **Same: Divorce.** Section 2921, Revised Statutes of 1899, which makes conviction of an infamous crime a ground for a divorce, presupposes the right of the innocent party to sue the convicted one. Ib.

3. **Same: Courts Should Protect Defendant.** The courts should protect the rights of a defendant so disabled, and it would be proper to appoint some attorney to look after his interest; especially if property interests are involved. Ib.

CONSTRUCTION. See **Administration**, 3, 10; **Appeals**, 1; **Covenants**, 1; **Evidence**, 7; **Exemptions**, 2; **Insurance**, 11, 12, 28, 29; **Master and Servant**, 10; **Practice, Trial**, 12; **Replevin**, 1; **Wills**, 1, 2.

1. **Statutory: Penal Statutes: Remedial Compensation.** A penal action can not be for less than the penalty given by the statutes, but section 2864, Revised Statutes 1899, is remedial and compensatory as well as penal, and serves as compensation and as a protection against repetition of like wrongs. Marsh v. Railroad, 577.

2. **Same: Action.** When a statute blends a penalty with the measure of damages to the injured party as one claim fixed at a stated amount (in this instance of $5,000), and confers upon

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such party the right to recover the full sum, it leaves such party in control of the action, and he may accept or sue for whatever sum he chooses within the amount fixed by the statutes. Ib.

CONTRACTS. See Attorney and Client, 1; Covenants, 1; Dramshops, 1; Evidence, 10, 11; Frauds and Perjuries, 1, 2; Replevin, 1; Sales, 1.

1. **Interest.** A contract for the purchase of fruit trees, providing that they were to be paid for by "one-half the gross amount of sales from the crop each year, etc., to be credited hereon from year to year until the full amount, together with six per cent compound interest shall be paid, and the final payment shall be made within ten years, regardless of the amount paid from year to year, if the amount shall not be paid prior thereto," is a contract to pay the principal with interest compounded annually from date of the contract. Stark v. Anderson, 128.

2. **Consideration: Release: Foreclosure: Taxes.** To secure the payment of an immatured debt the creditor promised the debtor to release him from an agreed bonus, and plaintiff made another loan to pay the debt, when the creditor refused to accept payment without the bonus. Thereupon the debtor paid the bonus, the creditor agreeing to refund the same if he secured a new loan for his money, which he did. *Held*, there was sufficient consideration for the first agreement and the release of the first was sufficient consideration for the second; and this notwithstanding the deed of trust securing the new loan might have been foreclosed by reason of the non-payment of taxes. Fullerton v. Schloss, 195.

3. **Delivery.** If a contract is delivered to the obligee, it takes effect at once as a complete contract, no matter what parol conditions were attached to it and these can not be shown. Martin v. Witty, 262.

4. **Same: Escrow.** But if, instead of being delivered to the obligee, a contract is deposited with a third party, it is permissible to show by oral testimony that it was deposited as an escrow and was not to take effect until a certain parol condition was complied with. Ib.

5. Under the evidence in this case, which is examined at length, it was a question for the jury whether the contract sued on was delivered. Ib.

6. **Liquor Selling: Public Policy.** Liquor selling is made a legitimate occupation, if the statutes are complied with, and contracts in relation thereto are not void as in contravention of public policy, but are enforceable as any other class of contracts. Mitchell v. Branham, 480.

7. **Restraint of Trade.** A contract, whereby a person agrees for a valuable consideration not to carry on a business in a designated locality for a definite length of time, is not a contract in restraint of trade, but binding upon the promisor. Ib.

8. **Public Policy: Agreement Between Rival Newspapers.** An agreement between proprietors of rival newspapers that they will bid the same for all public printing in the county, and that such bid shall not be less than the maximum legal rates, is a

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contemplated raid on the county treasury and is *contra bonus mores* and can not be upheld and enforced. Pendleton v. Asbury, 723.

9. **Same: Trial Practice.** When any party of an illegal contract can not open his case without showing he has broken the law the court will not assist him whatever his claim in justice may be. Ib.

10. **Non Est Factum: Pleading: Verification.** Although an answer denies the execution of a contract, its execution stands confessed unless the answer is verified. Weber v. Pyramids, 729.

11. **Corporation: Ultra Vires: Pleading.** The defense of *ultra vires* is affirmative matter and should be specially pleaded and if not so pleaded the corporation can not rely upon such defense. Ib.

CORPORATIONS. See **Contracts,** 11.

COSTS. See **Practice, Trial,** 6, 7.

COUNTERCLAIM. See **Instructions,** 1, 2; **Justices' Courts,** 5; **New Trial,** 1; **Pleading,** 5; **Practice, Trial,** 4, 11; **Replevin,** 2, 3, 4.

COVENANTS.

1. **Dependent and Independent.** In an action by the vendee for breach of warranty of title to chattels, a covenant in the contract of sale, binding plaintiff to do certain things, which did not go to the entire consideration and was to be performed at a different time from that of the transfer of title, was an independent covenant, and it was not necessary to plead and prove performance of it in order to recover. Neville v. Hughes, 455.

2. **Vendor and Vendee: Warranty of Title: Notice to Vendee of Defect.** Previous knowledge by vendee of a defect in the title to the property purchased, is no defense to an action on a covenant warranting the title. Ib.

CRIMINAL LAW. See **Definitions,** 1; **Husband and Wife,** 1; **Reward,** 1, 2.

1. **Venue.** In a prosecution against a druggist under section 3051, Revised Statutes of 1899, for permitting the drinking of intoxicating liquor in defendant's place of business, where the evidence failed to show that the place of business was in the county where the information was filed, or in this State, the venue was not established. State v. Hottle, 34.

2. **Winegrowers: Misdemeanor.** One who sold without a dramshop license, in less quantities than one gallon, wine made on his own premises from grapes, only part of which were grown on the premises, is guilty of a misdemeanor, under section 3014, Revised Statutes of 1899. State v. Miller, 297.

3. **Dramshops: Keeping Open on Sunday: License.** In a prosecution against one for keeping a dramshop open on Sunday, it was not necessary for the State to show that the defendant had a license as a dramshop keeper. State v. Gillespie, 400.

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4. **Same.** Where a witness for the State testified that he entered a back room of the defendant's saloon on Sunday, with a companion, that the companion went into the front room and returned in a few minutes with a bottle of whiskey, that he saw, through the opening in the partition, several men standing in front of the bar, but did not see them drinking, that he saw a man standing behind the bar, whom he took to be the defendant; this is sufficient evidence to support a verdict of guilty. Ib.

5. **Same: Misconduct of Counsel.** Where the prosecuting attorney, in his closing argument, used the following language: "They can afford to pay a fifty dollar fine and then go ahead and sell liquor on Sunday, as they will do," and the court refused to reprimand him, it was error and justified a remanding of the case for a new trial. Ib.

CROPS. See **Landlord and Tenant**, 5.

DAMAGES. See **Action**, 3; **Nuisances**, 2, 3; **Sales**, 8; **Trespass**, 2; **Verdicts**, 1.

1. **Breach of Contract of Hiring: Seeking Other Employment.** An employee who sought to recover damages for his employer's breach of the contract of hiring, was not bound to diminish his damages by seeking work elsewhere while he was waiting in reasonable expectation of being called into service by the employer at any time. Mathews v. Wallace, 96.

2. **Same.** Although after the time his alleged employment began, the employee was paid commissions for the sale of horses to the employer, that was not inconsistent with his assertion that he was employed to train horses for the employer, when it appeared that such sales were initiated prior to the time of such employment. Ib.

3. **Personal Injuries: Elements of Damages: Future Pain and Loss of Earnings.** Where the evidence showed that the plaintiff's ankle was broken and was and would remain weaker than the other one, an instruction that the jury might consider future pain and anguish, and loss of earnings, is held by a majority of the court to have been no error, although plaintiff was at the time of the trial doing the same work and receiving the same wages as before the injury. **(Bland, P. J., dissenting.)** Duffy v. Transit Co., 235.

4. **Measure of: Overdriving Horses.** In an action for damages caused by overdriving a team let to the defendant for hire, where the injuries to the team are permanent, the proper measure of damages is the difference between the value of the team immediately before and immediately after the injury, and the reasonable expenses incurred and value of time spent in endeavoring to effect a cure. Cunningham v. Dickerson, 410.

5. **Personal Injuries: Elements of Damages: Harmless Error.** In an action for damages for injuries to plaintiff's wife, caused by the negligence of defendant, it is not reversible error to instruct the jury to allow for the cost of medicines which they believe plaintiff has purchased, where the other proved items of the loss and expenses exceed the award of the jury, and it is evident that the jury allowed no more than a trivial sum, if anything, for the medicines. Abbitt v. Transit Co., 534.

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6. **Same.** Nor was it error to instruct the jury to include a reasonable amount paid for medical services, although there was no direct testimony that the charge of the physician was reasonable; the presentation of the physician's bill and its payment is sufficient evidence that it was reasonable to sustain the verdict. Ib.

7. **Same: Loss of Time: Pleading.** Plaintiff's loss of time in attending his wife, while suffering from her injuries, was a proper element of damage, and, where the evidence was reviewed on that question without objection, it is too late, after verdict, to raise the question that such loss of time was not averred in the petition. Ib.

DEBTOR AND CREDITOR.

Contractor and Subcontractor: Payments without Authority: Instructions. A contractor can not pay claims against a subcontractor until liens for such claims have been filed and action brought on them, unless such payment is made at the subcontractor's request, expressed or implied, or by his assent given after payment. An instruction is condemned for ignoring this rule. Trippensee v. Braun, 628.

DECEIT.

1. **Insurance Agent: Pleading.** An insured who charges that the defendant, an insurance agent, represented that he would procure his insurance in a company doing business in the State, fails to state a cause of action. Jones v. Horn, 705.

2. **Same: Insolvency.** An insurance agent's representation that he would procure plaintiff a policy in a good company is tantamount to saying that he would procure a policy in a solvent company. Ib.

DEEDS. See **Waste, 2.**

1. **Names: Question of Fact.** Where the evidence shows that it was possible to read the name of a grantee in a deed, as either Mack or Mock, it was for the trial court to say whether the former name was intended. Fenderson v. Tie & Timber Co., 290.

2. **Alterations: Explanatory Evidence.** Alterations in a deed are presumed to have been made innocently and before acknowledgment and delivery, but if there are suspicious circumstances apparent on the face of such an instrument, offered in evidence, the court may let in testimony as to when and under what circumstances the alterations were made. Kalbach v. Mathis, 300.

3. **Same.** Where one description in a sheriff's tax deed, in the column for the range number, showed an erasure with the number "7" inserted on the abraded surface, and the other description showed an erasure of the word "five" and the word "seven" written above it, both alterations in different ink from the rest of the instrument, and the clerk's entry of the acknowledgment, taken in open court, described the land as in range 5, it was proper for the trial court to take evidence bearing upon when and how the alterations were made. Ib.

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4. **Same.** The evidence is examined and the finding of the chancellor that the alterations were made after delivery and his ruling excluding the deed from evidence, held to be correct. Ib.

DEFAULT. See **Justices' Courts**, 1.

DEFINITIONS. See **Exemptions**, 1; **Municipal Corporations**, 10.

Wine Grower. The meaning of the term "wine grower" as used in section 3015, Revised Statutes of 1899, is a person who manufactures wine from grapes grown on his own premises. State v. Miller, 297.

DEFENSE. See **Frauds and Perjuries**, 1, 2.

DELIVERY. See **Contracts**, 3, 4, 5.

DIVORCE. See **Convicts**, 1, 2, 3.

Alimony Pendente Lite. In an action for divorce by the wife on the statutory ground of "indignities," the husband filed answer denying the allegations, and a cross-bill, in turn praying to be divorced on the ground of indignities, the evidence is examined and the husband held to be the innocent and injured party and divorce granted him as prayed in the cross-bill, but alimony *pendente lite* for attorney fee and suit money allowed the wife. Shy v. Shy, 122.

DOWER. See **Homestead**, 1.

DRAMSHOPS. See **Definitions**, 1; **Criminal Law**, 2, 3, 4, 5; **Municipal Corporations**, 1, 2, 3, 4, 5, 13, 14.

Contracts Concerning Illegal Business. Unlicensed sales of liquor, and other contracts regarding intoxicating liquors, which contravene the provisions of the penal statutes, are obnoxious to the law, and a party to such a contract has no remedy for a breach of it. Mitchell v. Branham, 480.

DRIVER. See **Negligence**, 1, 2.

EJECTMENT. See **Jurisdiction**, 1.

ELECTION.

1. **Wager: Stakeholder's Liability: Statutory Liability.** Sections 3430 and 3431, Revised Statutes of 1899, apply only to elections, under the Constitution, of persons for public office, and wagers on such elections; these sections do not apply to primary elections for the purpose of nominating candidates for public office, and do not authorize the recovery from the stakeholder of the wager placed in his hands on such primary election. Dooly v. Jackson, 21.

2. **Same: Common Law Liability.** A wager on the result of a primary election is illegal at common law, but one who makes such a wager and places his money in the hands of the stakeholder can not recover it, unless he notifies the stakeholder before the result of the election has been ascertained not to pay the money over. Ib.

EMBLEMENTS. See **Administration**, 10; **Landlord and Tenant**, 5.

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EQUITY.

Fraud: Refusal of Defendant to Testify. Where grave charges of fraudulent conduct were made against the defendant in the statement of the plaintiff's cause of action, the failure of the defendant to testify on his own behalf and make explanation of incriminating testimony offered by the plaintiff, must be regarded as strong circumstances against him. Nelson v. Hall, 466.

ESTOPPEL. See **Appeals**, 4; **Municipal Corporations**, 7.

EVIDENCE. See **Deeds**, 2, 3, 4; **Husband and Wife**, 5, 6; **Insurance**, 6, 7, 16; **Railroads**, 4, 5, 6, 7, 11; **Sales**, 4, 5; **Tax Bills**, 4, 5.

1. **Cost Bond: Title of Cause: Variance.** In an action on a cost bond, alleged to have been filed in a suit brought in the name of a city at the relation of S., where the bond offered in evidence omitted the city's name and gave the relator as plaintiff, though it clearly appeared that it was filed and intended as security in that case as alleged, it was error to exclude it; there was no variance between the pleading and the proof. McGee v. Smith, 40.

2. **Same: Estoppel.** The bondsmen, having filed the bond, on the faith of which the relator was enabled to continue the prosecution of his suit and to force the incurring of additional costs in that case, are estopped to deny that the bond offered was the bond alleged. Ib.

3. **Landlord and Tenant: Lien on Crop: Waiver: Agency.** In an action under section 4123, Revised Statutes of 1899, by the landlord, for the value of a crop, against a purchaser from the tenant, where the question of waiver, by agent, of the landlord's lien on the crop, was in issue, it was error to exclude evidence as to the scope of the agency, and the apparent authority of the agent; the power of the agent to lease the land did not carry with it the power to waive the lien. Wimp v. Early, 85.

4. **Same: Release of Lien on Other Crops.** Evidence that the landlord consented to the sale of other portions of the crop on the land was not admissible to prove a waiver of the lien on that portion concerning which suit was brought. Ib.

5. **Same: Value of Other Security.** Evidence showing the value of other security taken by the landlord for the payment of his rent was inadmissible to show waiver of the landlord's lien on the crop. Ib.

6. **Hearsay.** The introduction of hearsay evidence by plaintiff to prove an issue to which no defense is offered is not prejudicial error. Mathews v. Wallace, 96.

7. **Depositions: Exhibits: Statutes.** The statute requires all exhibits proved or referred to to be inclosed, sealed up and directed to the clerk of the court where the action is pending, and exhibits not so treated are inadmissible in evidence. Crane Co. v. Neel, 177.

8. **Same: Court's Discretion.** A party may withdraw his depositions and have exhibits properly attached, but this must be

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done before the trial, and to permit it at the trial is within the sound discretion of the court. Ib.

9. **Contents of Lost Instrument.** Where one party to a suit claimed to have lost certain letters received from the other, and the other denied having written them, it was competent for the first to testify to their contents. Bank v. Wright, 242.

10. **Contract: Escrow.** When a written undertaking is deposited in the hands of a third party, to be held by him until some condition is performed before delivery, parol evidence is admissible to show the performance of the condition for the purpose of showing that the contract may be enforced. Martin v. Witty, 262.

11. **Same: Parol Evidence to Vary Written Contract.** But parol evidence is not admissible for the purpose of engrafting upon the contract a condition of delivery which, in fact, is an essential condition of the contract itself, one which would vary its terms. Ib.

12. **Husband and Wife: Alienation of Affections: Res Gestae,** In an action by a wife for the alienation of her husband's affections, evidence of improper relations between the defendant and the husband, one and two years before the separation of husband and wife, where the intimacy continued down to the separation, was properly admitted because part of the *res gestae*, and because proper for the purpose of explaining the subsequent conduct of the parties. Linck v. Vorhauer. 368.

13. **Assumption of Risk: Notice to Employer of Employee's Inexperience.** In an action for damages sustained by plaintiff in the death of her husband, who lost his life by reason of being put to work by defendant in an unsafe place, where the answer sets up assumption by deceased of the risk incident to the employment, and the evidence shows deceased was wholly inexperienced in that line of work, it was not error for the trial court to permit a witness to testify that he told the boss in charge deceased was a "green hand" and it was not safe to put him at such work. Hunt v. Lead Co., 377.

14. **Opinion of Witness.** Nor was it error for one witness to state what he thought the boss meant by certain directions given to him (the witness) where the evidence shows that such directions could have meant nothing else. Ib.

15. **Same: The Usual Method of Doing Work.** Nor was it error to show the usual method of doing the work which deceased was put to do, and that it was unsafe to do it in the condition the place was in, when the facts showed that it was unsafe. Ib.

16. **Peremptory Instruction.** The evidence in the case is examined and it is held that a peremptory instruction to find for plaintiff was properly refused. Bank v. Hammond, 403.

17. **Return of Officer: Garnishment.** The return of the constable, indorsed on the notice of garnishment which was served on the garnishee, is original evidence of the fact of service, and it is unnecessary to show an indorsement of the fact on the execution. Cooper v. Scyoc, 414.

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18. **Impeaching Witness.** When it is proposed to discredit a witness by proof of prior contradictory statements, a foundation must first be laid by showing the time, place, etc., and giving the witness an opportunity to explain. Nagel v. Transit Co., 438.

19. **Same: Affidavit for Continuance.** Under section 687, Revised Statutes of 1899, where an affidavit for a continuance on account of an absent witness sets out what he would swear to, and is introduced as the evidence of such witness, it is competent to impeach the testimony by showing that the witness has made statements which contradict it, and this without laying any foundation. Ib.

20. **Parol Testimony to Vary Written Contract.** Parol testimony is not admissible to enlarge or vary the terms of a written contract which is complete within itself. Neville v. Hughes, 455.

21. **Same: Consideration.** Nor is it permissible, under the mask of establishing an additional consideration, to show that a party to it undertook obligations different from those expressed in the contract. Ib.

22. **Letterpress Copies of Correspondence.** Where it has been shown that original letters were neither within the control of either party nor within the jurisdiction of the court, and reasonable efforts have been exhausted to procure them, duly identified letterpress copies of the originals are admissible in evidence. Nelson Mfg. Co. v. Shreve, 474.

23. **Same: Proof of Insolvency.** Where the issue of insolvency was before the court, an estimate of the value of the property of the alleged insolvent, made by one who disclaimed accurate knowledge of its value, was admissible for what it was worth. Ib.

24. **Documents: Issue of Fact.** The rule of law that courts must determine the meaning of documentary evidence has no relevancy when the dispute is not as to the legal meaning of documents, but as to their tendency to prove one side or the other of an issue of fact, and different inferences may be fairly drawn from them as to what the truth was. Carp v. Ins. Co., 502.

25. **Judicial Notice: Kansas City Suburbs.** The courts will take judicial notice that Independence, Missouri, and Argentine, Kansas, are suburbs of Kansas City, in fact, one continuous urban population, although the latter suburb is separated by the State line. Johnson v. Railroad, 588.

EXEMPTIONS.

1. **Husband and Wife: Head of Family.** So long as the marriage relation exists *de jure*, the husband must be regarded as the head of the family within the meaning of the exemption statute. White v. Smith, 199.

2. **Married Women: Statutory Construction.** Under section 4335, Revised Statutes 1899, a married woman may invoke all exemptions and homestead laws now in force for the protection of her personal and real property where the husband has made no such claim for the exemption of his property. Ib.

FAMILY. See **Exemptions,** 1, 2.

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FORCIBLE ENTRY AND DETAINER.

Damages on Appeal Bond. In an action for forcible entry and detainer, on appeal in the circuit court, it is error to include, with a judgment of restitution, a summary judgment for damages against the principal and sureties on the appeal bond. Crow v. Williams, 451.

FRAUD. See **Insurance, 6, 7.**

FRAUDS AND PERJURIES. See **Landlord and Tenant, 5, 6.**

1. **Statute of Frauds: Pleadings: Defense.** The statement of a cause of action upon a contract need not show affirmatively that the contract is without the statute of frauds; it is a matter of defense to show it within the statute. Mathews v. Wallace, 96.

2. **Contract for Indefinite Time.** A parol contract of hiring, for an indefinite time, may be performed within a year, and is therefore without the statute of frauds. Ib.

3. **Statute of Frauds: Performance on One Side.** An oral contract, which is not to be wholly performed within a year, is taken out of the statute of frauds when it is entirely performed on one side. Mitchell v. Branham, 480.

FRAUDULENT CONVEYANCES.

1. **Husband and Wife: Husband's Earnings Given to Wife.** An insolvent debtor can not continuously give to his wife practically all his earnings and allow her with such gifts to acquire, in her own name and for her separate use, property and hold it exempt from the demands for his creditors. Wolfsberger v. Mort, 257.

2. **Same.** In the proportion his money is used to purchase property in her name, she holds such property in demands of his creditors. Ib.

GARNISHMENT. See **Actions, 1, 2, 3, 4, 5; Evidence, 17.**

GUARDIAN AND CURATOR.

Minor: Choosing Guardian: Public Guardian and Curator. A minor, whose estate is in charge of the public administrator, and ex officio public guardian and curator, on attaining the age of fourteen years, may choose another guardian and curator under section 3489, Revised Statutes of 1899. State ex rel. v. Mast, 348.

HOMESTEAD.

1. **Incumbrance by Husband: Dower: Filing Claim by Wife.** Prior to the law of 1895, the husband could sell or encumber the homestead, subject to the wife's inchoate right of dower, except where the wife had filed her claim as provided by section 5435, Revised Statutes of 1899. Stark v. Anderson, 128.

2. **Same.** Where, however, the wife is not a party to the contract by which the husband encumbers the property, her rights,

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whether originating from the marriage or otherwise, are not affected. Ib.

3. **Same.** Fruit trees do not constitute such an improvement upon land, an equitable lien for which, created by contract with the husband, is paramount to the rights of the wife. Ib.

HUSBAND AND WIFE. See **Evidence**, 12; **Divorce**, 1; **Exemptions**, 1, 2; **Fraudulent Conveyances**, 1, 2; **Homestead**, 1, 2, 3; **Limitations**, 1; **Witnesses**, 1.

1. **Witness.** As an exception to the common law rule, the wife is a competent witness against her husband in a prosecution for wife abandonment and may make affidavit as a basis for the information charging him with the offense. State v. Bean, 255.

2. **Alienating Affections: Damage of Plaintiff's Character.** An instruction requiring the jury to take into consideration damage to plaintiff's character was properly given. Linck v. Vorhauer, 368.

3. **Necessaries: Authority of Wife to Bind Husband.** Where a husband and wife are living together contentedly and he is providing for the wants and comforts of his family including herself, without complaint from them, the power of the wife to pledge her husband's credit for any article purchased must rest upon an agency either express or implied. Johnson v. Briscoe, 493.

4. **Same.** Where the husband was a farmer of moderate circumstances and provided, so far as it appears, for the necessaries of his family, without complaint, in an action for the price of a gold watch purchased by his wife, the question of his liability should be determined, not on the question of the necessity of the article purchased, but on the wife's agency in making the purchase. The necessity of the article bought, the means of the parties, their condition in life, the previous conduct of the husband with reference to his wife's purchases, all enter into the inquiry as bearing on the measure of authority, and the case should be submitted to the jury on such evidence to say whether the wife acted within the scope of her ostensible or actual agency when she bought the watch. Ib.

5. **Same: Evidence.** The testimony of a neighbor, that his daughter wore watches, was incompetent. Ib.

6. **Same.** Nor was it competent to show that the defendant's wife milked the cows or did other work about the farm. Ib.

INJUNCTION. See **Waste**, 1, 2.

INSTRUCTIONS. See **Debtor and Creditor**, 1; **Husband and Wife**, 2; **Municipal Corporations**, 8, 9, 12; **Practice, Trial**, 4, 12; **Railroads**, 12.

1. **Peremptory Instruction.** Where the evidence was susceptible of an inference contrary to plaintiff's contention on a certain issue, a peremptory instruction to find for him on that issue was properly refused. Oliver v. Love, 73.

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2. **Instruction: Presumption.** In an action on a note, where there was a counterclaim and it was a matter of dispute whether some items of the counterclaim were included in a settlement which was had at the time the note was given, it was proper to refuse an instruction to the effect that there was a presumption of law that defendant owed the amount of the note at the time of its execution. Ib.

3. **Contributory Negligence: Ignoring Defense.** In an action for injuries received in a collision with a street car, caused by the negligent management of the car by defendant's servants, where the defense was contributory negligence on the part of plaintiff, it was error to submit an instruction, covering the plaintiff's theory of the case, which ignores the defense of contributory negligence, unless such defense is properly presented in other and separate instructions. Hanheide v. Transit Co., 323.

4. **Same.** Another instruction, which purported to give a legal definition of contributory negligence, but demanded that such negligence shall be the sole and direct cause of the accident, in order to defeat recovery, was insufficient to meet the requirement. Ib.

5. **Correct as a Whole: Judgment for Right Party.** Although the wording of some of the instructions is open to criticism, yet, when all considered together, they are substantially correct, and the verdict was manifestly for the right party, the judgment will be affirmed. Hunt v. Lead Co., 377.

INSURANCE.

1. **Life: Mutual Beneficiary Associations: Forfeiture of Benefit: Self-Executing By-Laws: Notice.** Where the by-laws of a mutual beneficiary association provide that a failure by a member to pay his assessment on or before a certain day shall work, *ipso facto*, a suspension and forfeiture of all right under any beneficiary certificate issued to such member, without any action on the part of the lodge, such provision constitutes a valid agreement between the lodge and the holder of the certificate; and he is not entitled to notice or a hearing before suspension for such failure. Lavin v. Grand Lodge, 1.

2. **Same: Waiver.** The officer of a subordinate lodge in a beneficiary association, who is not an agent of the grand lodge, has no power to waive a by-law of the order. Ib.

3. **Same.** Where the laws of a beneficiary association require monthly assessments to be paid on or before a certain day of each month, which assessments are required to be collected by the subordinate lodges and remitted to the grand lodge on or before the first day of the succeeding month, and where the officer of a subordinate lodge, whose duty it was to collect such assessments, was accustomed to receive them after the day provided for the payment, but it was not shown that any officer of the grand lodge had any knowledge of the practice of receiving assessments after they were due, such practice does not constitute a waiver of the requirement as to the time of payment so as to prevent a suspension. authorized for non-payment. Ib.

4. **Same: Evidence.** In the action by the beneficiary in a death certificate in a mutual beneficiary order, where the defense is abandonment of the order by the insured, a letter purporting to

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be written by the beneficiary, the widow of the insured, deceased, appealing to the order for aid and admitting that he had failed to pay his dues, is admissible in evidence, although she denies having written or sent such letter and it was not addressed to anybody, where the financier of the local lodge testified that she asked him to intercede with the lodge in her behalf, and he told her to write to the lodge and that afterwards the letter was handed to him by her or one of her daughters, it being a question for the jury to determine whether she wrote it making such admissions or not. Ib.

5. **Value of Property: Statute Conclusive.** The statutes of the State relating to fire insurance become a part of a policy of insurance by implication, as if embodied therein, and all stipulations of the policy must yield to the statute. Ritchey v. Ins. Co., 146.

6. **Same: Fraudulent Representations: Evidence.** In an action on a policy of fire insurance, where the defense is that the policy was obtained by fraudulent representations as to the value of the property, but the answer fails to state that the policy would not have been issued had the company known the real state of the facts, and where there was no written application for the policy, oral evidence as to such fraudulent representations was properly excluded. Ib.

7. **Same.** Where the policy authorized cancellation at any time by the company and the evidence showed that the soliciting agent, who took the policy, was familiar with the property insured, it is too late, after the loss is sustained, to pray in the answer to have the contract annulled on account of the fraudulent representations as to the value. Ib.

8. **Employer's Liability Policy: Notice of Accident.** A stipulation in an "employer's liability" policy that the "assured, upon the occurrence of an accident, shall give immediate notice thereof. with the fullest information obtainable," to the assurer, is a reasonable requirement. Columbia P. S. Co. v. Fidelity & C. Co., 157.

9. **Same: "Immediate Notice:" Reasonable Time.** Notice of an accident to the insurer given with diligence and in a reasonable time, due regard being had to the attending circumstances, is a legal compliance with the requirement for "immediate notice." Ib.

10. **Same: Corporation: Notice to Agent.** The knowledge of a forewoman that an employee, who had previously worked under her, was sick and claimed that her illness was due to the infected material she was required to work with, was not notice of such claim to the employer, where the duties of such forewoman were to direct employees where and how to work, without power to engage or discharge them. Ib.

11. **Construction of Policy.** The provisions of insurance policies are liberally construed in favor of the insured. Ib.

12. **Same: Employer's Liability Policy: Accidental Injuries.** Kidney disease, contracted by an employee by handling infected rags for her employer, is an injury "accidentally suffered," within the terms of an employer's liability policy. Ib.

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13. **Accident: Pleading: Sufficiency of Petition.** In an action on an accident insurance policy, where the petition alleges that the insured sustained bodily injuries though external, violent and purely accidental causes, resulting in death, in that while he was employed as a bridgeman for a railway company, he "was struck upon the head by some hard substance, inflicting a mortal wound," the language was precise and full enough to constitute a good averment that the insured met death by an "external, violent and purely accidental cause." And, though the averment is followed with the allegation: "A more particular description of the circumstances of said accident can not here be given because they are to the plaintiff unknown," that does not make the petition insufficient. Jamison v. Casualty Co., 306.

14. **Burden of Proof.** In an action on an accident insurance policy, where the evidence showed an accidental death of the insured, and the defense relied upon was that the liability was only for the minimum rate fixed by the policy, because the deceased met his death from "unnecessary exposure to danger or to obvious risk of injury," as conditioned in the policy, the burden was on the defendant to show that the insured met his death in a way that would bring into operation the minimum indemnity clause. Ib.

15. **Unnecessary Exposure.** The evidence showed that deceased, who was stationed at a bridge to flag trains approaching it, went to his station one night and the next morning his body was found a short distance from the track. Blood stains were traced from there to the track where his hat was found on the track cut in two. Just before his death and while in a semiconscious state, deceased stated that he had been struck by the train while asleep. *Held*, that deceased may or may not have been exposing himself to unnecessary danger, as defined by the terms of the policy, and it was a question for the court sitting as a jury to determine whether he was or not. Ib.

16. **Same: Declarations of Insured.** Where the evidence relied on by the defendant to show that the deceased met his death from having gone to sleep on the track where he was struck by the train, where the statements of deceased made just before his death, when in a semiconscious condition, in answer to suggestive questions which had to be repeated, so that it was doubtful if he understood what was said to him, such statements do not establish the fact so conclusively as to make it the duty of the appellate court to determine it contrary to the finding of the trial court. Ib.

17. **Arbitration of Loss: Waiver.** A denial by an insurance company of any liability for a loss dispenses with a term of the policy requiring an appraisement of the amount of the loss. Carp v. Ins. Co., 502.

18. **Same: Pleading Non-Liability no Waiver.** But when suit is brought by the insured for damages sustained on account of a loss, a denial of liability in the company's answer, which pleads incendiarism or other act of insured sufficient to annul the policy, does not waive the defense of no appraisement, where that is also pleaded. Ib.

19. **Same: Answer in Former Suit.** And an answer thus denying liability, filed in a former suit, on the same cause of action,

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which was dismissed, was improperly received in evidence to show waiver of appraisement. Ib.

20. **Same: Preventing Appraisement by Insured.** Where an insurance policy provides for an appraisement, if the insured, or his chosen appraiser, acts in bad faith and prevents an appraisement, by postponing indefinitely the choice of an umpire, or otherwise, the fact will be a defense to any suit he may bring for the loss. Ib.

21. **Same: Preventing Appraisement by the Insurer.** And where the insurer does not in good faith carry out an agreement to arbitrate the amount of the loss, but endeavors to utilize the agreement to obtain delay, it can not demand an appraisal as a condition precedent to the insured's right to sue. Ib.

22. **Same: Misbehavior of Appraiser Imputed to Party Choosing Him.** The unfair behavior of an appraiser may be taken into account against the party that appointed him, in fixing the blame for the failure to execute an appraisal agreement. Ib.

23. **Same: Preventing Appraisal by Both Parties.** If both parties to an insurance contract, endeavor to prevent an appraisal, the appraisement clause of the contract will cease to be a condition precedent to the right of action for the loss. Ib.

24. **Same: Honest but Futile Effort by Appraisers.** An honest, but futile effort by the appraisers, to arbitrate, unless it causes too protracted and wholly unreasonable delay, will not dispense with the need of appraisal. Ib.

25. **Arbitration: Disagreement as to Amount of Loss.** The insured, who has agreed to submit the ascertainment of a loss to arbitration, can not afterwards be heard to say that the arbitration clause in his policy is inoperative because there is no dispute as to the amount of the loss. Ib.

26. **Same: Withdrawing from Arbitration Agreement.** The insured can not withdraw from an agreement to arbitrate, where the policy simply provides for an appraisal of the amount of damages sustained and the arbitration is not intended to cover the whole question of liability. Ib.

27. **Mutual Benefit Association: Certificate of Health.** In an action on a benefit certificate issued by a fraternal beneficiary society, where the question for determination was whether the deceased had paid his dues, and a per capita tax, required by the rules of the order, within the time they were payable, and it appeared the defendant had refused to accept such dues and tax which were tendered after a given time, a demand for a health certificate required by the rules of a delinquent, as a condition of accepting such payments was an arbitrary measure and it was not necessary to show presentation of such health certificate in order that the plaintiff might recover. Boyce v. Royal Circle, 528.

28. **Foreign Company: Statute: Agent's Liability.** No insurance company is authorized to do business in this State without a certificate from the superintendent of insurance; and a person acting as agent without obtaining from said superintend-

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ent a certificate, is guilty of a misdemeanor and subject to a fine. Jones v. Horn, 705.

29. **Same.** When a statute imposes punishment which acts upon the offender alone and not as a reparation to the party injured, and where it is entirely within the discretion of the lawgiver, it will not be presumed that he intended that it should extend further than is expressed; and the statute regarding insurance imposes a penalty upon an agent for violation of its provisions and not as a reparation to the party injured. Ib.

INTEREST. See **Contract, 1; Verdict, 2.**

Judgment on Counterclaim. In an action on a note in which a counterclaim was filed, where the jury found the amount due both on the note and the counterclaim, striking a balance, the finding on the note was afterwards set aside, leaving the finding on the counterclaim undisturbed, and a new trial was had at a subsequent term on the note: *Held*, interest should have been allowed on the amount found due on the counterclaim from the date of the first verdict, in striking the balance between the two claims. Oliver v. Love, 73.

JUDGMENTS. See **Forcible Entry and Detainer, 1; Justices' Courts, 1, 2; Practice, Appellate, 9.**

Not an Entirety: Reversing as to Some of the Parties. A judgment is not an entirety so as to prohibit correction by reversal as to one or more of the parties, where, the substantial rights of the other parties as to whom it is affirmed, will not be impaired thereby. Crow v. Williams, 451.

JURISDICTION. See **Administration, 2; Justices' Courts, 6; Taxbills, 1.**

1. **Court of Appeals: Ejectment.** An action for the value of improvements, under section 3072, Revised Statutes 1899, is a continuation of the ejectment suit out of which it grows, and the court of appeals has no jurisdiction of the subject-matter. Bristol v. Thompson, 376.

2. **Same: Amount in Dispute.** When the plaintiff sues for the sum of $4,500 under section 2864, Revised Statutes 1899, which allows a recovery of a stated sum of $5,000, and the defendant denies liability therefor, the amount in dispute is $4,500 and on appeal the court of appeals and not the Supreme Court has jurisdiction. Marsh v. Railroad, 577.

3. **Appearance.** Where the court has no inherent jurisdiction of the subject-matter, the appearance of the parties at the trial will not confer such jurisdiction. Dennis v. Baily, 638.

JURY. See **Negligence, 5; Railroads, 10; Witnesses, 5.**

JUSTICES' COURTS. See **Amendment, 1; Bills and Notes, 1.**

1. **Default: Setting Aside Judgment.** Under section 3969, Amended Statutes of 1899, a justice of the peace has no power to set aside a judgment by default except at the instance of the defendant or his agent; he can not set it aside at the instance of the plaintiff. Crooker Shoe Co. v. Fry, 134.

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2. **Same: Collateral Attack: Insufficient Service.** A judgment by default, rendered by a justice of the peace upon service within and less than the period required by law, is not subject to collateral attack for insufficiency of service. Ib.

3. **Lost Note: Affidavit.** A statement filed with the justice verified by affidavit of plaintiff's counsel, comprising a statement of the loss or destruction of the notes involved, accompanied by copies of the notes, authenticated by the affidavit of an officer of plaintiff, is sufficient compliance with section 3854, Revised Statutes of 1899. Warder, Bushnell & Glessner Co. v. Libby, 140.

4. **Statement of Complaint.** Where all the facts essential to a recovery are to be gathered from the complaint, it is a sufficient statement of a cause of action, in a suit brought before a justice of the peace. Cunningham v. Dickerson, 410.

5. **Counterclaim: Dismissal of Plaintiff's Action.** Under sections 3947 and 4009, Revised Statutes of 1899, where an action was brought before a justice of the peace and a counterclaim was filed by defendant, and the plaintiff afterwards dismisses his cause of action, the justice had jurisdiction to proceed to trial on the counterclaim as did also the circuit court to which the case was appealed. McCormick Harvesting Co. v. Hill, 544.

6. **Replevin: Jurisdiction: Residence.** A justice of the peace has no jurisdiction to replevin property in his township where both parties are non-residents of his county; and under section 4486, Revised Statutes 1899, the jurisdiction in such case is alone in a court of record. Dennis v. Bailey, 638.

LANDLORD AND TENANT. See **Evidence**, 3, 4, 5.

1. **Rent in Kind.** An agreement to rent land for "two-fifths of the corn in the crib," entitles the landlord also to recover two-fifths of the value of the fodder raised on the land and converted by the tenant to his own use, though the fodder is not mentioned in the agreement. Black v. Scott, 37.

2. **Costs: Jurisdiction: Conversion.** Costs are properly taxed against the defendant in an action for conversion, though the right of action rose out of a contract of lease and the amount of the verdict was below the jurisdiction of the circuit court where the case originated. Ib.

3. **Pleadings: Lien on Crop: Waiver.** In an action under section 4123, Revised Statutes of 1899, for the value of a crop by the landlord, against a purchaser from the tenant with knowledge that it was grown on the leased premises and that the rent was unpaid, an answer which avers "that plaintiff gave to (the tenant) her consent for him to sell and dispose of, and collect all of the money for all crops raised by him, and especially the timothy seed (the subject of the suit)" was broad enough to let in proof that plaintiff consented to the sale and thereby waived her lien, although the answer, in addition, pleaded that plaintiff waived her lien by taking other security upon which she relied solely for the collection of her rent. Wimp v. Early, 85.

4. **Lien on Crops: Waiver: Taking Other Security.** A stipulation in a mortgage, taken by a landlord on the land of his tenant to

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secure the payment of the rent on the land leased, that nothing in said mortgage should be construed as a waiver of the statutory lien on the crops on the leased land, did not create a mortgage on such crops, but was intended to avoid a possible inference that, in taking other security, the landlord relinquished the statutory security. Ib.

5. **Same: Statute of Frauds.** A crop of timothy seed, whether sold before or after it was gathered, was not a part of the realty, and a parol release of the landlord's lien for rent thereon could be made, unaffected by the statute of frauds. Ib.

6. **Same: Consideration.** The unconditional consent of the landlord to the sale of the crop, is a waiver of his lien thereon for the rent, although there is no consideration for such waiver. Ib.

7. **Purchase of Crop: Notice.** Under section 4123, Revised Statutes of 1899, a landlord, whose rent has not been paid, may recover against the purchaser from his tenant the value of the crop sold, where the purchaser knows the crop was grown on demised premises, although he had no notice that the rent was unpaid. Williams v. DeLisle Store Co., 567.

LIENS. See **Evidence, 3, 4, 5; Homestead, 3; Landlord and Tenant, 4, 5, 6, 7.**

LIMITATIONS.

Coverture. The statute of limitations does not run against a wife, who sues for the alienation of her husband's affections, as long as she is not divorced, although she is separated from him. Linck v. Vorhauer, 368.

LOST INSTRUMENT. See **Evidence, 9; Justices' Courts, 3; Practice, Trial, 5, 6, 7.**

MARRIED WOMEN. See **Exemptions, 2.**

MASTER AND SERVANT. See **Damages, 1, 2; Evidence, 13, 14, 15; Frauds and Perjuries, 1, 2.**

1. **Leaving Service: Assumption of Risk: Tools.** The rule that a servant is not required to quit the service because the master has failed to furnish safe appliances and that by remaining in the service he does not waive his right to recover for injuries if he has reasonable ground to believe he can safely use the appliances furnished by the exercise of proper care, has no application to the facts of this case. Leitner v. Grieb, 173.

2. **Same: Ability to Perform Work: Inexperience.** Where the master directs his servant to perform certain work and the servant objects because the work is beyond his power, and thereupon the master tells him to either do the work or quit the service, and injuries result from the servant's inability to do the work, the master is not liable; nor is he liable where he can not reasonably anticipate and guard against the danger by the exercise of proper care; nor under the facts in this case does the youth and inexperience of the servant fix the liability on the master. Ib.

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3. **Negligence: Unusual Act: Stopping Freight Train.** If the master performs an act in the usual way there is no negligence, but if the manner of doing the act is unusual and injury results to the servant the master is liable; and where a freight train is stopped by an emergency brake in the place of the usual and ordinary service brake without any occasion for such emergency stop, there would appear to be negligence. Benedict v. Railway, 218.

4. **Same: Two Methods of Acting: Brakeman on Rear Platform.** The rule that an employee who has two ways of performing his labor, one safe and the other dangerous, and voluntarily chooses the latter, is guilty of contributory negligence, has no application to the facts of this case where a brakeman, as the train was slowing up at a water tank, took his lantern and "markers," and braced himself on the rear platform for the purpose of hanging the "markers" when the train stopped, and was thrown from the platform by an unnecessary emergency stop. Ib.

5. **Same: Injury in Sister State: Recovery in Missouri.** A brakeman injured by his master's negligence in Iowa may recover on the statute of that State in a suit brought in this State. Ib.

6. **Duty to Furnish Safe Appliances: Animals.** It is the duty of the master to furnish, for use of servants in his employment, appliances and instruments, safe and suitable for the purposes for which they are furnished; and this rule embraces animals to be used by the servant as well as inanimate appliances. McCready v. Stepp, 340.

7. **Same: Notice to Master.** To entitle a servant to recover for injuries received from a dangerous horse with which he was put to work, it was not necessary that the master should have had actual knowledge of the vicious character of the horse, but notice of circumstances which would put a reasonably prudent man on his guard, was sufficient. Ib.

8. **Fellow-Servant.** Where the superintendent of a mill put the employees under the control of a shift boss whose duty it was to direct them when and how to work, whose orders they were required to obey, the boss represented the company operating the mill and was not the fellow-servant of the employees under him. Hunt v. Lead Co., 377.

9. **Same: Statutes: Street Railways.** The fellow-servant statute, making master of common servants answerable for their negligence to each other, applies only to railroads as that word is commonly understood, and has no application to street railways. Johnson v. Railway, 588.

10. **Street Railways: Evidence: Assumption: Pleadings.** Though there is no evidence that defendant is a street railway, the whole case and pleadings are based upon that assumption, and the case will be so treated. Ib.

11. **Safe Appliances: Ordinary Care: Negligence.** While a master should furnish reasonably safe appliances for the servant's work, he is not an insurer and is not required to furnish any particular kind of appliances, but merely to use ordinary care in selecting suitable appliances; and no inference of negligence can arise from the use of tools such as are ordinarily used for

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like purposes by persons engaged in the same sort of business. Harrington v. Railroad, 663.

12. **Assumption of Risk: Method of Business.** The servant assumes the risks that are usually incident to the business, and the master may conduct his business in his own way; and where there is no negligence in the safety of the place or the appliances, the master is not liable for injuries to the servant. Ib.

13. **Same: Servant's Experience: Waiver.** Where the servant knows the risks and hazards ordinarily incident to the master's business as conducted, he assumes such risks and waives his right to compensation for injuries. Ib.

14. **Contributory Negligence: Evidence: Accident.** On a review of the evidence it is held, that the injury complained of by the plaintiff was the result of his own fault or an unforeseen casualty, and in neither event is the master liable. Ib.

MECHANICS' LIENS. See **Debtor and Creditor, 1.**

1. **Evidence: Contractor's Declarations.** The declarations of a contractor that materials were purchased for appellant's building, although made when they were obtained, are not evidence against the landowner, since they do not show that the sale was made upon the credit of the building where the material was used. Crane Co. v. Neel, 177.

2. **Materialman: Credit of the Building: Proof.** A materialman must prove that he sold the materials on the credit of the building or no lien attaches. Ib.

3. **Evidence.** The fact of selling on such credit may be proved by any circumstance which tends to show his purpose, and the declarations of the contractor that he bought for the building has no tendency to prove that the materialman sold therefor; but the act of the materialman in response thereto is evidence which the declaration explains. Deardorff v. Everhartt, 74 Mo. 37, is believed not to conflict with this view. Ib.

4. **Same.** Proof of the contractor's purpose is not proof of the materialman's purpose, and a contractor's declaration that the material is to go into a certain building is inadmissible to support the lien unless followed by proof of the materialman's immediate compliance with the declaration. Ib.

MINES AND MINING.

Royalty. Where the lessor of a zinc mine collected his royalty monthly from his lessees, to his satisfaction, knowing the quality and amount of matter taken from the mine, his administrator can not, after his decease, recover royalty for stuff removed from the mine during his lifetime, which was treated at the time as waste, and proved to be practically worthless when afterwards the lessees attempted to utilize it. Steer v. Dwyer, 523.

MISDEMEANOR. See **Criminal Law, 2.**

MORTGAGES. See **Attachment, 1, 2, 3; Trespass, 2.**

1. **Extension of Payment: Possession.** An extension of time for the payment of a debt does not postpone the mortgagee's right

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to the possession of the mortgaged property for failure to pay at the time originally agreed on. Buggy Co. v. Lowry, 186.

2. **Release: Other Debt: Agreement: Evidence.** Though a mortgagor may owe a mortgagee, yet unless the debt is a part of the mortgage debt, its non-payment will not excuse the mortgagee from releasing the mortgage upon the payment of the mortgage debt; and there is no evidence in this case of a valid agreement that the additional debt was to be paid before the release occurred. Henry v. Orear, 570.

3. **Same: Pleading: Instructions.** The fact that the mortgagee was not to release his mortgage until the mortgagor had paid an additional debt, is new matter and must be affirmatively pleaded in the answer, and an instruction set out in the opinion was properly refused on the pleadings. Ib.

4. **Same: Assignee: Penalty: Statute.** The fact that the defendant is a mere assignee in a note and mortgage for collection will not excuse him from the penalty for failure to release, since an assignee is expressly within the terms of the statute. Ib.

5. **Same: Penalty.** Though upon the payment of a given amount a certain part of the mortgaged land had been released, yet the mortagee is liable for the penalty of ten per cent upon the whole debt if, upon full payment, he refused to release the remainder of the land. Ib.

6. **Same: Parties: Pleading.** A mortgagee who files an answer and fails in the trial court to raise the question that a comortgagor has not been made a party, can not make such point in the appellate court. Ib.

MUNICIPAL CORPORATIONS.

1. **Ordinance: Advertisement for Bids.** Where a city, proceeding under sections 6261 and 6262, Revised Statutes of 1899, constructed a sidewalk in front of defendant's property, and the advertisement for bids for such construction referred for specifications to an ordinance which contained no specifications or provisions for such sidewalk, the proceeding was ineffectual to place a lien on defendant's lot. City of Louisiana v. Shaffner, 101.

2. **Dramshop License: Repeal of Ordinance.** Where an ordinance provides that no one shall conduct a dramshop in the city without paying a license fee, and subsequently another ordinance is enacted which, without altering the provisions of the first, provides regulations which must be complied with, by the applicant for license in order to get it, the second ordinance does not repeal the first. Ex Parte Hinkle, 104.

3. **Same: Cities of the Fourth Class.** Cities of the fourth class are given power by section 5978, Revised Statutes of 1899, to regulate and license dramshops, saloons and liquor sellers. Ib.

4. **Same: Ordinance: License Fee.** An ordinance which declares it to be unlawful for any person to engage in certain occupations enumerated, including that of dramshop keeper, without obtaining a license, the fee for which in the case of dramshops

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is fixed at $1,000 a year or $500 for six months, is not void for uncertainty. Ib.

5. **Same: Oppressive Ordinance.** One thousand dollars a year for saloon license in a city of the fourth class is not so unreasonable a charge that a court would be justified in declaring the ordinance fixing it void because unjust and oppressive. Ib.

6. **Special Assessment: Part Owner: Notice.** The owner of an undivided part interest in property abutting upon a street, improved by authority of the city, can not defend against an action by the city for his portion of the cost of such improvement, on the ground that his co-owners were not notified of the contemplated improvement. City of Louisiana v. McAllister, 152.

7. **Same: Estoppel.** Where such a part owner permitted the property to be assessed to him as sole owner, and paid taxes thereon as such, was notified as sole owner of the contemplated improvement and appeared before the city council to protest against it, remaining silent as to the true ownership, he is estopped to set up the defense of part ownership of the lot affected. Ib.

8. **Condition of Streets: Instruction.** A city is required to keep its streets in a proper state of repair and free from obstructions so that they are reasonably safe for travel; and an instruction requiring that the streets be kept in a "proper state of repair," and "free from obstruction," and "reasonably safe for travel," is improper. Russell v. Columbia, 74 Mo. App. 480, distinguished. Jerowitz v. Kansas City, 202.

9. **Same: Harmless Error.** Though an instruction like the above is faulty, yet it is not reversible error where other instructions clearly lay down the rule. Ib.

10. **Villages: Powers: Parks.** Municipal corporations possess and can exercise other powers than those expressly granted, provided they are necessarily and fairly implied in or incident to the powers expressly granted; but under the statutes of Missouri a village has no power to purchase and hold real estate for a park. Vaughn v. Greencastle, 206.

11. **Same: Definitions: Legitimate Purposes.** "Legitimate purposes," as applied to acts of municipal corporations, means such purposes as are authorized by the charter, and villages have no general power to deal in real estate. Ib.

12. **Icy Sidewalk: Obstruction.** A municipality is liable for injury because of rough and uneven ice so rounded up and inclined as to constitute an obstruction and make the sidewalk unsafe for travel with the exercise of ordinary care, and the city should remove the same within a reasonable time after notification, whether such ice is formed by accidental or incidental discharge of water. Quinlan v. Kansas City, 616.

13. **Same: Cure of Erroneous Instruction.** An instruction for a plaintiff relating to a city's liability for an icy sidewalk is held faulty because the jury was not told that such ice must amount to an obstruction rendering the walk unsafe; held, further that such fault is cured by defendant's instruction. Ib.

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14. **Dramshop Ordinance: Petition: County License.** An ordinance relating to the granting of a dramshop license, in a municipality, set out in the opinion, does not make it compulsory on the council of such municipality to grant a city license to an applicant who has qualified himself under the ordinance and obtained a license from the county court. State ex rel. v. Stiff, 685.

15. **Dramshop License: Qualified Applicant: Council's Discretion: Mandamus.** Whether a dramshop license shall be granted is a matter within the discretion of the city council, even though the applicant be qualified in every way; and such discretion can not be controlled by mandamus. (Cases considered.) Ib.

NAMES. See **Deeds,** 1.

NECESSARIES. See **Husband and Wife,** 3, 4, 5, 6.

NEGLIGENCE. See **Common Carriers,** 1; **Evidence,** 14, 15; **Instructions,** 3, 4; **Master and Servant,** 4, 5, 14; **Pleading,** 1; **Railroads,** 2, 3, 4, 9, 10, 15, 16.

1. **Contributory Negligence: Driver: Principal and Agent: Vehicle Passenger.** The negligence of a driver can not be imputed to a passenger in the vehicle unless the driver is the agent or representative of the passenger; and in this case there is no such intimation. Marsh v. Railroad, 577.

2. **Same.** If a person riding in a vehicle knows the driver is negligent, and takes no precaution to guard against injury, he can not recover, for in such case the negligence is his own and not simply that of the driver, and he can not rightfully omit to use care in blind dependence upon another; and the evidence fails to show plaintiff was guilty of contributory negligence. Ib.

3. **Pleading: General Charge.** A general charge of negligence is good unless objection is made at the proper time before the trial, and not after answer at the trial. Johnson v. Railway, 588.

4. **Proof of Accident: Explanation.** Plaintiff was in the lower story carting off trash and dirt made by carpenters who were taking up the upper floor. A crowbar fell "on the head and glanced off." It appears the carpenters were prying up the plank at the time. This was proof sufficient to put the defendant on its explanation to show how the crowbar happened to fall. (Cases considered.) Ib.

5. **Unfastened Window: Fall of Child: Jury Questions.** Where a reception room in a department store is almost constantly used by women customers and their small children, whether it is negligence to leave a window hung on pivots extending to the floor and twenty-five feet above the ground with no bars across it in the sole dependence that it would remain constantly bolted, is a question for the jury. Miller v. Peck Dry Goods Co., 609.

6. **Dangerous Premises: Invitation: Infant.** Where a department store keeps a reception room for its patrons and their children, the invitation to the trading public must be held to include infants and the owner owes the same duty to the customer's child as to the customer. Ib.

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7. **Pleading: Bars Across Window.** A petition is reviewed and held to fairly charge negligence in failing to maintain bars for a window swung on pivots regardless of whether there were or were not other fastenings which, when properly closed, would make it secure. Ib.

NEW TRIAL. See **Practice, Appellate, 2, 4, 5, 10.**

Counterclaim. Where the jury gave a verdict allowing a claim which was entirely unfounded and required a reversal of the case, and allowed also a counterclaim which was supported by meager evidence, and it seemed as if the jury had allowed it more to offset plaintiff's demand than because of its merits, the cause will be remanded for new trial on the counterclaim. Steer v. Dwyer, 523.

NOTICE. See **Administration, 5, 6; Bills and Notes, 5; Covenants, 2; Insurance, 9, 10, 11; Landlord and Tenant, 7; Master and Servant, 7.**

NUISANCE.

1. **Pleadings: Damages.** In an action to recover damages for a nuisance it is unnecessary to aver that the acts were unlawfully done. The cause of action is the wrong suffered, and the facts producing the wrong are the facts to be pleaded, and the amended petition is held to meet the requirements of the rule. Powell v. Brick & Tile Co., 713.

2. **Same: Damages: Gases.** The test of a nuisance is not the damage simply, but damage resulting from the violation of the legal right of another; and the stealthy attack of an unseen element poisoning the air is a violation of right as much as an open assault. Ib.

3. **Same: Corporations.** An incorporated brick manufacturing company has no license to create a nuisance, and the burning of brick is not in itself a nuisance, though a nuisance in itself may be carried on in a proper place where it produces no injury. Ib.

OFFICES AND OFFICERS. See **Action, 5.**

ORDINANCES. See **Municipal Corporations, 1, 2, 4, 5; Railroads, 11.**

PARLIAMENTARY MANUAL. See **Taxbills, 9.**

PARTIES. See **Mortgages, 6; Practice, Appellate, 2; Sales, 3.**

PAYMENTS. See **Debtor and Creditor, 1.**

PENALTY. See **Construction, 2; Mortgages, 4, 5.**

PERSONAL INJURY. See **Damages, 3, 5, 6, 7.**

PLEADING. See **Administration, 7; Amendment, 1; Benefit Societies, 5; Contracts, 10, 11; Attorney and Client, 2; Damages, 5, 6, 7; Deceit, 1; Frauds and Perjuries, 1; Justices' Courts, 4; Mortgages, 3, 6; Negligence, 3, 7; Nuisance, 1; Practice, Appellate, 16; Railroads, 20.**

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1. **Contributory Negligence: Pleading.** Where defendant did not plead contributory negligence in defense, an instruction to the jury that there was no issue that the injury sustained by the plaintiff was caused by his own negligence in getting off the car, was not a reversible error. (**Bland, P. J.,** dissenting.) Duffy v. Transit Co., 235.

2. **Amendments: Changing Cause of Action.** An amended petition, which substitutes a different cause of action from that stated in the original complaint, is properly stricken out on motion of defendant. Purdy v. Pfaff, 331.

3. **Same.** For the purpose of determining whether there is a departure from the original cause of action, a second amended petition must be compared with the original petition, not with the first amended petition, though no objection was raised to the first amended petition on the ground of departure. Ib.

4. **General Denial: Recoupment: Subrogation.** In an action by the consignee against a carrier, for conversion of a car load of coal, the defendant could not, under a general denial, recoup the price which it paid the consignor for the coal, nor the amount of the freight, nor raise a question of subrogation to the rights of the consignor by reason of having paid for the coal. Frazier v. Railroad, 355.

5. **Trial Practice: Counterclaim: Reply.** Where the defendant on dismissal of plaintiff's petition elects to prosecute his counterclaim, he becomes a plaintiff and the plaintiff a defendant, and the reply of the plaintiff becomes an answer in which he may set up his defenses or counterclaims, including even the cause of action pleaded in his dismissed petition; and section 4499, Revised Statutes 1899, supersedes the general rules governing the parties in their pleadings so far as is necessary to give effect to that section. Morrison Mfg. Co. v. Roach, 632.

PRACTICE, APPELLATE. See **Criminal Law,** 5; **Judgment,** 1; **Forcible Entry and Detainer,** 1; **New Trial,** 1; **Practice, Trial,** 1, 2, 3, 13, 14; **Railroads,** 12, 17.

1. **Weight of Evidence: Function of Trial Court.** When a verdict has been set aside by the trial judge for the reason that in his opinion it is against the weight of evidence, it is only in a case free from doubt that an appellate court will review the action. Spalding v. Edina, 45.

2. **New Trial: Ambiguous Testimony.** A new trial will not be ordered on the ground that the jury disregarded the testimony, regarding a certain issue, where such testimony was not free from ambiguity. Whiteside v. Longacre, 93.

3. **Bill of Exceptions.** Exceptions to the trial court's rulings on motions for new trial and in arrest, duly preserved in a bill of exceptions, are prerequisites to the review of such rulings by the appellate court. State ex rel. v. Pulliam, 94.

4. **Motion for New Trial: Reason for Sustaining Motion.** Where the order of the trial court sustaining a motion for new trial contains no statement of the grounds for it, as provided by section 801, Revised Statutes of 1899, the appellate court can

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not overrule such decision unless every assignment in the motion was without merit. Secrist v. Eubank, 113.

5. **Same: Weight of Evidence.** Where a motion for new trial was sustained, with no reason stated for the ruling, and one assignment in the motion was that the verdict was against the weight of evidence, and where there was substantial evidence against the verdict, the ruling will be approved by the appellate court. Ib.

6. **Appeal: Final Judgment: Ruling on Demurrer.** No appeal will lie from a judgment overruling or sustaining a demurrer under the provision of section 806, Revised Statutes of 1899. Rodgers v. Kallmeyer, 137.

7. **Equity.** In an equitable proceeding, where the record is incomplete and the evidence offered at the trial has not all been preserved, the appellate court will not consider the testimony. Nelson v. Hall, 466.

8. **Error Self-Invited.** Where a party acquiesces in an instruction to the jury, which presents an erroneous theory of the case, he can not be heard to complain of the error on appeal. McCormick Harvesting Co. v. Hill, 544.

9. **Judgment: Bill of Exceptions.** If the transcript of the clerk shows there is a judgment that is sufficient to sustain the appeal, the filing of a bill of exceptions must be shown by the record proper, and this may be done in an amended abstract by a recitation to that effect. Trippensee v. Braun, 628.

10. **Presumption: Appeal from Order Granting New Trial: Bill of Exceptions.** On an appeal from an order granting a new trial the appellate court may examine any other ground for the motion than that assigned by the trial court in its order sustaining the motion, and must presume that the order granting a new trial was justified by law; and where there is a failure to bring up the bill of exceptions the appellate court will presume there was sufficient reason for sustaining the motion and affirm the judgment. Morrison Mfg. Co. v. Roach, 632.

11. **Trial Practice: Irregular Proceedings: Objections: Exceptions.** Though a proceeding be irregular and out of established precedence, yet, if neither party interposed an objection nor save an exception the appellate court can not review the proceedings. Woody v. Railroad, 678.

12. **Same: Fair Trial.** When an issue is raised, fairly submitted and passed upon by the jury the result can not be disturbed when there is conflicting evidence and the trial court can not ignore the facts found by the jury but should act on them. Ib.

13. **Same: Reversal of Judgment.** The appellate court is not at liberty to reverse a judgment though irregular and erroneous unless the error committed against the appellant materially affects the merits. Ib.

14. **Court of Appeals: Decision of Supreme Court.** The court of appeals is bound to follow the latest case of the Supreme Court on any question. Jones v. Horn, 705.

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15. **Trial: Special Findings: Petition.** A respondent who saves no exception to a special finding of the trial court and takes no appeal therefrom, is not in a condition to question such finding in the appellate court when he is insisting that finding and judgment be affirmed. Ib.

16. **Same: Pleading: Amendment: Aider by Answer.** A petition against a brick manufacturing company for destroying plaintiff's crop by gases from its kilns, alleged that the defendant's work was negligently done. After the evidence was in the plaintiff amended by striking out the negligence, and the defendant answered and the trial went on and the case was submitted on the amended pleadings. *Held*, that the change of the cause of action, if any, was waived by the answer, and the appellate court can not consider such objection. Powell v. Brick & Tile Co., 713.

PRACTICE, TRIAL. See **Amendment,** 1; **Bills and Notes,** 1; **Contracts** 9; **Criminal Law,** 5; **Deeds,** 1; **Instructions,** 1, 2; **Practice, Appellate,** 1, 2, 3, 15, 16; **Railroads,** 8, 17; **Verdict,** 2.

1. **New Trial: Newly Discovered Evidence.** Affidavits, filed by defendant, with a motion for a new trial on the ground of newly discovered evidence, which contain only statements made to affiant's by plaintiff's husband, should not be considered because the evidence is hearsay. Spalding v. City of Edina, 45.

2. **Defect of Parties: Raised by Answer.** A defendant can not object that there is a defect of parties plaintiff on appeal, when he has failed to raise the point in his answer. Whitecotton v. Railroad, 65.

3. **Practice: Parties: Trespass: Prior Incumbrances.** In an action against a railway company for the value of ground used by it as a right of way, where the plaintiff had acquired title to the ground under the foreclosure of a deed of trust, the trustee in a prior deed of trust on the land was not a proper party, such prior deed of trust having been discharged before defendant answered. Ib.

4. **Counterclaim: Instructions: Burden of Proof.** Where, in an action on a note, a counterclaim containing several items was filed by defendants, and plaintiff replied admitting certain of such items, and instruction that the burden was on defendants to prove each and every item of their counterclaim by the greater weight of evidence, was properly refused. Oliver v. Love, 73.

5. **Lost Instrument: Affidavit Showing Loss of Contents.** An affidavit showing the loss and the contents of a lost instrument, filed in the case, is a sufficient compliance with section 4560, Revised Statutes of 1899. Jordon v. Vaughn, 110.

6. **Cost Bond: Supplying Lost Instrument.** A lost cost bond is not one of the instruments to be supplied under the provisions of section 4561, Revised Statutes of 1899; it may be supplied by affidavit of its loss and contents, under the general powers of the court. Ib.

7. **Same: Motion for Judgment.** A motion for judgment against sureties on a cost bond which has been lost, is not an action

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on a lost instrument within the meaning of sections 642 and 643, Revised Statutes of 1899. Ib.

8. **Evidence: Probative Force for Jury.** It is the constitutional right of every litigant, when he has offered substantial evidence tending to prove his case, to have the probative force of his evidence determined by the jury; and, for the purpose of deciding whether there is substantial evidence to submit to the jury, his testimony should be taken as true and every reasonable inference therefrom in his favor should be made. Ladd v. Williams, 390.

9. **Objection to Testimony: Failure to State Cause of Action.** An objection to the introduction of any testimony on the ground that the petition does not state a cause of action, is to be tolerated only where the complaint wholly fails to set forth a cause of action and would be held bad on a motion in arrest. Spalding v. Nesbit, 447.

10. **Cross-Examination of Witness.** It is competent, in cross-examining a witness, to ask whether he has borne alias names, for the purpose of affecting his credibility. Carp v. Insurance Co., 502.

11. **Motion in Arrest.** Objection may be raised by motion in arrest that the petition or other pleading on which a party has obtained affirmative relief, fails to state a cause of action, and this applies to a counterclaim filed in an action which originated before a justice of the peace. McCormick Harvesting Co. v. Hill, 544.

12. **Special Finding: Instructions.** The statute requiring the court to state in writing the conclusions of facts found separately from the conclusions of law, does not require the court to find on every phase of the case unless its attention is called thereto in a proper manner; and the appellate court will not reverse unless the matter is called to the attention of the court below. Redmond v. Railroad, 651.

13. **Appellate Practice: Misconduct of Attorney: Setting Aside Verdict.** In his argument to the jury plaintiff's counsel referred to certain refused evidence as well as to former verdicts in the cause, and when objection was raised said he did it through inadvertence. *Held*, no excuse, and the remedy is to set aside the verdict. Chowning v. Parker, 674.

14. **Evidence of Absent Witness: Loss of Affidavit.** Defendant filed an affidavit for continuance setting forth the evidence of an absent witness. Thereupon the trial proceeded upon the theory that the defendants would read the matter set out in the affidavit as evidence. When they desired to do so the affidavit was lost, but the defendant proceeded with the trial. *Held*, defendant should have asked leave to supply the lost affidavit, and failing to do that has no cause to complain. Ib.

PRINCIPAL AND AGENT. See **Administration**, 3; **Deceit**, 1, 2; **Insurance**, 28, 29; **Taxbills**, 7; **Witnesses**, 1.

Agency: Scope of Authority. In an action on a note secured by chattel mortgage on some cattle, where the mortgagee, after some correspondence with the mortgagor concerning the condition and care of the cattle, sent an agent to look after them,

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with a letter of introduction, as claimed by the mortgagor, which was lost, and the mortgagor's testimony as to the substance of the letter, showing the scope of the agency, was somewhat indefinite, the evidence was insufficient to submit to the jury the question of the agent's authority to settle the debt, the mortgagee having denied the authority and the letter. Bank v. Wright, 242.

PUBLIC POLICY. See **Contracts**, 5, 8, 9; **Dramshops**, 1; **Sales**, 6, 7.

QUANTUM MERUIT. See **Attorney and Client**, 2; **Brokers**, 1; **Sales**, 1.

RAILROADS. See **Common Carriers**, 1; **Master and Servant**, 4, 5, 11, 12, 13, 14.

1. **Street Railways: Right to Drive on Track.** One has a right to drive a vehicle on a street railway track, if in so doing he does not unnecessarily interfere with the operation of cars running thereon. Buren v. Transit Co., 224.

2. **Same: Negligence.** One is not guilty of negligence, as a matter of law, so as to bar recovery for injuries received by collision with a street car, in driving on the track at a rapid speed, in the nighttime when it was very dark. Ib.

3. **Duty of Companies: Light on Cars.** It is the duty of a street railway company to have its cars so lighted at night as to be seen at a safe distance by persons using the street, or to give warnings of their approach and so enable such persons to keep out of their way; and one traveling on the street has a right to presume that such duty will be performed. Ib.

4. **Contributory Negligence: Jury Question.** In an action for injuries received from a collision with a street car while plaintiff was driving at a rapid rate of speed on the track, at night when it was dark and foggy, where there was evidence tending to show that there was no headlight on the car and no warning sounded of the approach, the question whether he was guilty of negligence which contributed directly to his injury, was for the jury. Ib.

5. **Fires Caused by Locomotives: Circumstantial Evidence.** A plaintiff, suing a railroad company for damages caused by a fire alleged to have been set by sparks from a locomotive, is not to be defeated for lack of positive testimony on the issue, if he proves facts sufficient to authorize an inference that the coals or sparks from an engine of the company were the source of his loss. Gibbs v. Railroad, 276.

6. **Same.** But where there is no direct testimony to prove the ultimate fact essential to plaintiff's recovery, and circumstantial evidence is relied on, it must be of a kind to fairly point to the existence of the essential fact; the court must consider that the proven facts would tend to produce, in impartial minds, according to common experience, a belief that the unproven, but necessary, fact occurred. Ib.

7. **Same: Competency.** In such a case it is competent to show that defendant's engine, had thrown fire far enough to cause

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such an injury, and, by expert testimony, that well-equipped engines generally would do so. Ib.

8. **Same: Setting Aside Verdict.** Where there was no testimony that the train, which passed immediately before the discovery of the fire, threw sparks, nor testimony to what exent defendant's engine ever threw sparks, nor opinions of experts as to whether locomotives emit sparks large enough to fly the distance of the burned building, 50 feet; and where the evidence showed that three stoves in the house had fires in them at the time, and that the house had caught fire previously in some manner other than from engine sparks, and other slight circumstances tending to show the fire was not caused by the engine, the evidence was insufficient to support a verdict for the plaintiff. Ib.

9. **Street Railways: Duties of Motormen and Drivers of Vehicles: Jury Question.** The plaintiff, driving a heavy wagon, started across the track on which defendant's car was approaching, looked and saw the car at a distance of 225 feet while his horses were about five feet from the track, and whipped up his team in order to get across, when the wagon struck on the rear end before it was wholly across, causing the injuries complained of. *Held*, it devolved upon the plaintiff and the motorman alike to exercise due care to avoid the collision and it was for the jury to determine which was in fault. Hanheide v. Transit Co., 323.

10. **Same: Last Chance.** And, although, plaintiff was negligent in approaching and crossing the track, under the circumstances, that would not justify the infliction of the injury, if the motorman by the exercise of reasonable care and caution could have avoided it. Ib.

11. **Same: Evidence: Vigilant Watch Ordinance.** In an action against a street railway company for damages caused by a collision of defendant's car with plaintiff's wagon, a vigilant watch ordinance of the city may be introduced without first proving that defendant had contracted with the city to abide by its terms. Nagel v. Transit Co., 438.

12. **Same: Inconsistent Instructions.** Appellant can not complain that the instructions are inconsistent where they properly submit the opposing theories of the parties, and the inconsistency, if any, was invited by appellant. Ib.

13. **Crossings on Private Property.** Sections 1105, Revised Statutes of 1899, imposes the duty on a railroad company of building crossings for the convenience of proprietors, through whose farm its line runs, and a "crossing" includes not only that portion of the earth's surface immediately by and between the rails, but the approaches on both sides of the track. Birlew v. Railroad, 561.

14. **Same: Approach to crossing.** Under section 1105, Revised Statutes of 1899, the owner of a farm through which the railroad right of way runs, after due notice, can recover from the railroad company the cost of constructing a bridge as an approach to a crossing, where the railroad company has already

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constructed fences, gates, and laid planks on either side of the rails at that point. Ib.

15. **Railroads: Killing Stock: Entering on Track.** It is the place where animals come upon the railroad track that determines the liability, and not where they are killed; and a railroad company is not required to fence its tracks at its stations and is not liable for stock entering on its tracks there and passing over bridges to another part of the track where it was killed. Redmond v. Railroad, 651.

16. **Same: Fencing: Negligence.** A railroad company is not liable for killing stock where its track is not, but might be, fenced, unless there is proof of negligence. Ib.

17. **Same: Negligence: Appellate and Trial Practice.** The question whether an engineer might have seen stock on the track in time to avoid killing it can not be raised for the first time in the appellate court, and a trial court is not required to instruct on different phases arising in a case unless asked to do so. Ib.

18. **Killing Stock: Evidence.** A plaintiff in an action against a railroad for killing stock is not compelled to establish his case by direct proof, but may do so by such circumstances as will justify the necessary inferences. Brown v. Railroad, 691.

19. **Same: Trespassing: Consent of Landowner.** Where the plaintiff's horse, for killing which he sues, was pastured upon the land of the adjoining proprietor with his consent, the railroad company owes him the duty to keep a lawful fence and will be liable for injuries to his horse by failure so to do. Ib.

20. **Same: Instructions: Pleading.** A reference in an instruction to the pleadings where the facts necessary to be found are fully told in other instructions, will not warrant a reversal. Ib.

21. **Same: Attorney's Fee: Constitution.** Section 1107, Revised Statutes 1899, authorizing the taxation of an attorney's fee in cases where the plaintiff recovers against a railroad for killing stock, has been decided unconstitutional by the Supreme Court in Paddock v. Missouri Pacific Railway Company, 155 Mo. 520. Ib.

REAL ESTATE BROKER. See **Brokers**, 1.

RECOUPMENT. See **Pleading**, 4.

RELEASE. See **Contracts**, 2; **Mortgages**, 2, 3.

REPLEVIN. See **Justices' Courts**, 6.

1. **Executory Contract.** An agreement to give plaintiff sixteen bushels of wheat out of defendant's crop, in repayment for that amount borrowed, does not vest title in the plaintiff so as to authorize an action of replevin, where no wheat was set apart for him under the agreement. Mattison v. Hooberry, 287.

2. **Counterclaim.** In an action for possession of personal property, the plaintiff's demand for possession may be opposed by

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any defense which goes to defeat his right; and if, in addition to the possession of chattels, the plaintiff asks damages for their detention, whatever defense will defeat or diminish his recovery of damages ought to be allowed, whether it be a defense in the nature of a set-off, counterclaim or defensive matter in the strict sense of the words. McCormick Harvesting Co. v. Hill, 544.

3. **Same.** And with a view to settling all controversies in one action, where possible, a counterclaim in a replevin suit may be enforced to the extent of granting affirmative relief to the defendant by judgment in his favor for an amount above what is found due to the plaintiff, as a separate cause of action in defendant's favor, and not merely as a matter of defense. Ib.

4. **Same: Subject of Action.** In an action of replevin for the recovery of animals under a chattel mortgage which secured a note given in payment for machinery, the subject-matter of the action was the alleged indebtedness secured by the mortgage, and a counterclaim filed by defendant for the value of the machinery returned to the plaintiff was sufficiently connected with the subject-matter of the action to enable him to maintian it. Ib.

REWARD.

1. **Apprehension of Criminal.** In a contest over a reward offered for the apprehension and conviction of a murderer, as between one who furnishes information pointing to the guilty party, and one who takes prompt and energetic measures and spends time and money to procure the arrest, and elicits a confession from the murderer, the latter is entitled to the reward. Ralls County v. Stephens, 115.

2. **Same.** And an officer who, without knowing that a reward is offered, actually makes the arrest, at the instance of one who spends time and money and takes prompt and energetic measures to apprehend the criminal, is not entitled to the reward as against the latter. Ib.

SALES. See **Covenants**, 1, 2.

1. **Quantum Meruit: Apportionable Contract.** Where one entered into contract to deliver a certain quantity of hay, and delivered only a portion of the same, he can not sue on the contract, but may sue in assumpsit for the value of the hay delivered. Briggs v. Morgan, 62.

2. **Same: Set-Off.** And if the other party was damaged by plaintiff's failure to comply with his contract, he can plead such damage as a set-off. Ib.

3. **Stranger Claiming Title.** Where plaintiff alleged in his complaint that he sold a lot of ties, under a contract, and the purchaser, instead of paying him for them, paid the defendant who set up some claim to them, a motion in arrest of the judgment rendered in plaintiff's favor should have been sustained, because the proceeding was against the wrong party. Martin v. Land & Lumber Co., 232.

4. **Title in Vendor Until Payment.** In the absence of other agreement, expressed or implied, concerning the time of payment for chattels sold, the sale is made impliedly for cash, and title does not pass to the vendee until payment or tender of payment is made. Frazier v. Railroad, 355.

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5. **Same: Inference of Payment Not Cash.** But where the testimony of the consignor shows that he relied upon the promise of the agent of the carrier to see that he got his money, if consignee did not pay in a reasonable time, this is evidence from which it may be fairly inferred that the sale was not for cash on delivery. Ib.

6. **Unlawful Business: Incidental Violation of Law.** Where the vendor of a saloon fixtures and good will, agreed as part of the consideration of the sale to abstain from the saloon business in that locality for a given time, the contract was not void because the sale included an assignment of the vendor's license and was followed by a continuance of the business by the vendee under the vendor's license until that expired, before taking out a license of his own, where it appears that there was no intention to violate the law; the contract was not necessarily void because its performance may have led incidentally to a violation of the law, if such violation was not its intention or necessary consequence. Mitchell v. Branham, 480.

7. **Dramshops: Contract by Vendor to Refrain From Business: Conducting Illegal Business.** In an action by the vendee of a saloon business against his vendor to recover damages caused by the latter's violation of his contract to refrain from engaging in the same business at the same place within a given time, the plaintiff can not recover for the loss of profits, caused by the defendant's breach of the contract, during the time the plaintiff was conducting his business without a license. Ib.

8. **Breach of Contract: Measure of Damages: Remittitur.** Defendant sold plaintiff apples in the orchard which he was to pick and plaintiff to pack in barrels. Defendant refused to let plaintiff have the apples. *Held,* measure of damages was the difference between the market price on the day of delivery and the price agreed to be paid at the place of delivery, less the cost of barrelling the apples; and an instruction omitting the deduction of the cost of barrelling was error and a remittitur was properly entered for that amount. Howell v. Dickerson, 658.

9. **Same: Failure of Evidence: Action.** By the terms of the contract plaintiffs were to pick 150 barrels a day, but there was no evidence that they did so. *Held,* immaterial since the defendant did not give them an opportunity to perform their contract; and besides had they failed in that respect, plaintiff would have had his action therefor. Ib.

SCHOOLS.

1. **School District.** Where a schoolhouse was used for various public purposes besides keeping school in it and the people of the neighborhood, at an entertainment given for the purpose, raised a fund to buy articles of furniture for the schoolhouse, and placed the fund in the hands of a committee to make the purchase, the school district had no right or interest in the fund. Scribner v. Smith, 542.

2. **Same: Trustee of Express Trust.** The persons composing the committee were trustees of an express trust and authorized to sue one in whose charge the money had been placed and who refused to turn it over. Ib.

SERVICE. See **Evidence, 17; Justices' Courts, 1.**

SET-OFF. See **Sales, 2.**

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Ch. 91, Art. 6, see page 207.
Ch. 91, Art. 7, see page 209.
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Section 3481, see page 643.
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Acts of 1875, page 104, see page 446.

Acts of 1885, page 27, see page 352.

Acts of 1895, page 35, see page 352.

SUBROGATION. See **Pleading**, 4.

TAXBILLS.

1. **Jurisdiction of Council: Remonstrators.** When a majority of property owners abutting on a street sought to be improved, sign and file a remonstrance with the city clerk, it ousts the council of jurisdiction; and the withdrawal therefrom of remonstrators can not reconfer jurisdiction. To make the taxbill issued for such improvement valid new proceedings should be begun. Following Knopfl v. Roofing & Paving Co., 92 Mo. App. 279. Sedalia ex rel. v. Scott, 595.

2. **Same: Record.** A remonstrance against a street improvement, and the written withdrawal therefrom, and the report of the committee to which these were referred constitute a part of the record of the city council. Ib.

3. **Same.** On a review of the record it is found that a majority of the property owners remonstrated, and the attempted subsequent withdrawal of a part of said remonstrators was non-effective, since the remonstrance had already completed and fulfilled its purpose. Ib.

4. **Same: Parol Evidence.** Where the record of a city council in a proceeding for a public improvement at the expense of the property of a citizen without his consent fails to show the council had jurisdiction, the action taken under such record is void and can not be validated by parol testimony. Ib.

5. **Same: Administrator.** On a review of the record it appears that no name signed by an administrator was counted in making up the total number of remonstrators, and it was proper to refuse evidence tending either to contradict the record or to supplement it in such a vital particular. Ib.

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6. **Same.** The marks and figures on a remonstrance are reviewed and held insufficient to show that an administrator was counted as a remonstrator; however, in such case the record must control and can not be contradicted by surmise or conjecture or eked out by parol evidence. Ib.

7. **Same: Principal and Agent.** That certain associations and corporations signed a remonstrance by their chief officer is sufficient, and it can not be shown that the signatures were attached without authority from the board of directors. Ib.

8. **Same.** While the record of a municipality may be attacked by parol evidence in behalf of a citizen whose property is taken or taxed *in invitum*. Yet such record can not be questioned by the city in any particular since that is tantamount to holding that no record is necessary. Ib.

9. **Same: Parliamentary Manual.** An objection that the council in receiving a report had not conformed to the parliamentary manual adopted to govern its proceedings is held, not well taken and such bodies are not bound to act in accordance with their rules or by-laws as they may, and oftener than otherwise do, waive them. Ib.

TAXES. See **Contracts, 2.**

TENDER.

Acceptance of Conditional Tender. The acceptance of a tender which is made upon condition that it is in full satisfaction of the debt, does not discharge the balance unpaid, nor bar an action therefor, unless there is a dispute in good faith as to the amount due; there is no consideration for such acceptance. Supply Co. v. Dreyfus, 434.

TRADE. See **Contracts, 6; Sales, 6, 7.**

TRESPASS. See **Railroads, 19.**

1. **Title of Plaintiff: Equity in Stranger no Defense.** It is no defense to an action against a railway company for the value of land taken by it for right of way, to allege that plaintiff's title is defective by reason of an equitable right in a stranger arising from a contract, where defendant was not a party to the contract and it was not made for defendant's benefit. Whitecotton v. Railroad, 65.

2. **Same: Measure of Damages: Mortgage, Purchaser Under: Title Relates Back.** In an action against a railway company for the value of ground taken for right of way through plaintiff's farm, where plaintiff acquired title under the foreclosure of a deed of trust after the railroad was located through the land, though the deed of trust was executed prior to that time, plaintiff's title relates back to the date of the deed of trust so that he may recover the value of the land actually taken, though he can not recover for incidental damages to the farm. Ib.

TRUSTS AND TRUSTEES. See **Chattel Mortgages, 1; Schools, 2.**

VEHICLE. See **Negligence, 1, 2.**

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VENDOR AND VENDEE. See **Covenants, 2.**

VENUE. See **Criminal Law, 1.**

VERDICTS. See **Railroads, 8.**

1. **Excessive: Instructions.** The instruction in the case is approved, and the verdict held not to exceed the amount justified by the facts. Fullerton v. Schloss, 195.

2. **Verdict: Interest not Calculated.** A verdict for a certain sum with interest from a given date, with the interest not calculated, is sufficient on motion in arrest; the judge, or the clerk under his direction, may supply the calculation. Nelson Mfg. Co. v. Shreve, 474.

WASTE.

1. **Equitable Owner: Injunction.** An equitable owner of land may have relief by injunction against waste. Kalbach v. Mathis, 300.

2. **Same.** Where, in such an action, the plaintiff had acquired his interest by purchase under execution, having a deed with an erroneous description of the land, where all the proceedings were regular with proper descriptions up to and including the judgment, but the execution was not in evidence, this was not enough to show that plaintiff had purchased by a correct description and a judgment against him is affirmed. Ib.

WAIVER. See **Appeals, 4; Benefit Societies, 3, 4, 6; Evidence, 3, 4, 5; Insurance, 17, 18; Landlord and Tenant, 3, 4, 5, 6; Master and Servant, 13.**

WILLS.

1. **Foreign Exemplified Copy: Probate Necessary.** Under sections 4634 and 4635, Revised Statutes of 1899, an exemplified copy of a foreign will, though authenticated according to the act of Congress by the official custodian thereof, is not sufficient to prove a testamentary transfer of title to lands in this State, without an exemplification of the judgment of some court admitting the will to probate. Fenderson v. Tie & Lumber Co., 290.

2. **Same: Presumption from Record.** The fact that an authenticated copy of a foreign will appears to have been recorded does not raise the presumption that it was admitted to probate, so as to dispense with evidence upon the subject. Ib.

WITNESSES. See **Husband and Wife, 1; Practice, Trial, 10.**

1. **Wife's Testimony: Agency.** A wife, who kept her husband's accounts, did his writing and at his dictation wrote letters to the mortgagee concerning a note and chattel mortgage on his cattle, was not his agent so as to make her a competent witness for him, under section 4656, Revised Statutes of 1899, in regard to a settlement of the note, had between her husband and the agent of the mortgagee. Bank v. Wright, 242.

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2. **Agent of Deceased Party to Note.** One who acted as agent for the payee of a note, in the transaction leading to its execution, is a competent witness for plaintiff in an action thereon, though the maker of the note is dead, provided the witness has no interest in the suit. Dawson v. Wombles, 272.

3. **Waiver of Incompetency.** Where a party permits an incompetent witness to testify without objection and then cross-examines him in the hope of eliciting favorable testimony, he can not afterwards object to the incompetency of the witness. Ladd v. Williams, 390.

4. **Chattel Mortgage: Identification of Property.** One of several mortgagees in a chattel mortgage, given to secure the mortgagees as sureties on the mortgagor's note, is not a competent witness to identify the property mortgaged, after the death of the mortgagor, under section 4652, Revised Statutes 1899, although the mortgage provides that the property could be identified by him. Ib.

5. **Expert: Instructions: Jury.** Juries are in no wise bound to accept the opinions of expert witnesses if they deem them unreasonable, but an instruction that they should consider their professional standing and experience is, however proper, since the trial court should give the jury some guide for the consideration of such evidence. Cosgrove v. Burton, 698.

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Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—DIMINUTION OF RECORDS. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

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RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—EVIDENCE—BILL OF EXCEPTIONS TO BE ALLOWED, WHEN. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—EXCEPTIONS—QUESTIONS TO BE EMBODIED IN BILL. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—DUTY OF CIRCUIT COURT CLERKS IN MAKING TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the* ——— *day of* ———, 188--, *executed on the* ——— *day of* ———, 188--;" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any

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abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—BILL OF EXCEPTIONS IN EQUITY CASES. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—ABSTRACT AND BRIEFS TO BE FILED AND SERVED. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgement of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where

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the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—AGREED STATEMENT OF THE CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—MOTION FOR REHEARING. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the Court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

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RULE 22.—EXTENDING TIME FOR FILING STATEMENTS, ABSTRACTS, ETC. In no case will extension of time for filing statements, abstracts, and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause filing a motion, either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before mak- the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

RULE 25.—WHEN APPEAL IS RETURNABLE—CERTIFICATE OF JUDGMENT—TRANSCRIPT. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason can not or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

Attest:

L. F. McCoy, Clerk.

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Rules of Practice in the St. Louis Court of Appeals.

REVISED OCTOBER 17, 1888.

TO BE IN FORCE NOVEMBER 1, 1888.

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room.

RULE 2.—MOTIONS. All motions in a cause shall be in writing signed by counsel and filed for record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the law library, and to no other place, and then they must leave written receipt therefor, but shall return such record to the Clerk's office within five days after taking the same.

RULE 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS DISALLOWED BY TRIAL COURT. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the trial court.

RULE 11.—EXCEPTIONS TO ADMISSION OR EXCLUSION OF EVIDENCE. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—BILL OF EXCEPTIONS IN EQUITY CASES. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

RULE 13.—DUTY OF CLERK IN MAKING OUT TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the*

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regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (*e. g.*): "*Summons issued on the* ——— *day of* ———, 188--, *executed on the* ——— *day of* ———, 188--;" and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter, touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 14.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14*a*.—ABSTRACTS IN LIEU OF TRANSCRIPTS WHEN FILED AND SERVED. In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing and shall in like time file four copies thereof with the Clerk of this Court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file four copies thereof with the Clerk of this Court. Objections to such complete or additional abstract shall be filed with the Clerk of this Court within five days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time.

RULE 14*b*.—COSTS FOR PRINTING ABSTRACTS AND RECORD. Costs will not be allowed either party for any abstract filed in lieu of a full transcript under section 2253, Revised Statutes 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same (unless the court, upon an inspection of the record, should become satisfied that the printing of the entire record was unnecessary for a full understanding of the points presented). The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reason-

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ableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge.

RULE 15.—BRIEFS, WHEN TO BE FILED. In all civil cases the appellant, or plaintiff in error, shall file with the Clerk of the Court, at least one day before the cause is called for trial, four copies of a brief, containing: *First.* A clear and concise statement of the pleadings and facts shown by the record. *Second.* An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. *Third.* If he so elects, an argument supporting each proposition made or relied on.

"The appellant, or plaintiff in error, shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court four copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief as aforesaid, prepare, file and serve, a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk."

RULE 16.—BRIEFS AFTER SUBMISSION. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

RULE 17.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise the number of the edition, the volume, the chapter, the section, the paging and side paging shall be set forth.

RULE 18.—APPELLANT'S BRIEF TO ALLEGED ERROR COMPLAINED OF. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior court,

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and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 19.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant, or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15 the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or at its discretion continue or reset the cause on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of rule 15.

RULE 20.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which may intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 21.—MOTIONS FOR REHEARING. Every motion for rehearing should be founded on suggestions of some party to the case, or of counsel, pointing out distinctly such grounds of error as are claimed to exist in the judgment of this court or in the opinion delivered. Such motion must be filed within ten days after delivery of the opinion of the court, and a copy of the motion, with any brief to be submitted in support thereof, shall be served upon the opposite party within the same period.

RULE 22.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said laws.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement; in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the

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commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party or his attorney of record, by telegram, by letter or by written notice of his proposed proceeding. When said adverse party or his attorney of record resides in the city of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the city of St. Louis, twenty-four hours' additional notice for each one hundred miles shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 25.—APPEARANCE OF COUNSEL. The counsel who represented the parties in the trial court, in any cause coming to this Court, will be held to represent the same parties, respectively, in this Court; but, should other counsel be engaged, they must enter their appearance in writing, the counsel for the appellant, or the plaintiff in error, ten days, and the counsel for the respondent, or the defendant in error, five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing of the counsel of the opposite party, to such appearance, be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 26.—In view of the rulings of the Supreme Court, confining the jurisdiction of this court in issuing original remedial writs to such cases wherein it has appellate jurisdiction, it is ordered: No original remedial writs, excepting such as are in aid of the appellate jurisdiction of this court and excepting also writs of habeas corpus and prohibition, will hereafter be issued by this court or any of the judges thereof, except in cases where the application of such writs can not be effectually presented to the Circuit Court or the Supreme Court, or some judge thereof. Nor will any writ of prohibition be issued in any case whereof the Supreme Court has appellate jurisdiction.

RULE 27.—Garnishees claiming any allowance in this Court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditure paid or incurred upon the appeal.

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